Epilepsy Foundation of Northeast Ohio *and* Arnis Borgs *and* Ashraful Hasan. Cases 8–CA–28169 and 8–CA–28264

July 10, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On January 2, 1998, Administrative Law Judge Richard A. Scully issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

Introduction

The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by discharging employees Arnis Borgs and Ashraful Hasan. The General Counsel contends that both Borgs and Hasan were discharged for engaging in protected concerted activity. In arguing that the discharge of Borgs is unlawful, the General Counsel requests the Board to once again consider the question of whether the principles set forth by the Supreme Court in *NLRB v. J. Weingarten*[2] should be extended to employees in nonunionized workplaces, to afford them the right to have a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The General Counsel contends that affording nonunionized employees this right is consistent with the Court's decision. We agree with the General Counsel's contentions, including those concerning *Weingarten*, and for the reasons set forth below, find that the discharges of both Borgs and Hasan are unlawful.

The Discharge of Arnis Borgs

The essential facts pertaining to Borgs' discharge are not in dispute. The Respondent provides services to persons affected by epilepsy. One of its programs involves a research project concerning school-to-work transition for teenagers with epilepsy. Borgs worked on this project as an employment specialist, and Ashraful Hasan was the Respondent's transition specialist on this project.

On January 17, 1996,[3] Borgs and Hasan prepared a memo to the Respondent's director of vocational services, Rick Berger, who was their supervisor on the project. The memo stated that Berger's supervision of Borgs and Hasan was no longer required.[4] A copy of this memo was also sent to the Respondent's executive director, Christine Loehrke. Thereafter, Borgs and Hasan learned that Loehrke and Berger were very unhappy about the memo. In view of this reaction, on January 29, Hasan and Borgs prepared another memo, this time addressed to Loehrke, which elaborated on the reasons for their prior assertion that Berger's supervision was no longer required. Specifically, the memo was critical of Berger's involvement in the program, and cited several examples of incidents where, in their view, Berger acted inappropriately.

On February 1 Loehrke approached Borgs and directed him to meet with her and Berger. Borgs felt intimidated by the prospect of meeting with both Loehrke and Berger together because of a reprimand he received at a prior meeting with them,[5] and expressed these reservations to Loehrke. Borgs asked if he could instead meet with Loehrke alone. Loehrke refused Borgs' request. Borgs then asked if Hasan could be present with him at this meeting, but Loehrke refused this request as well. Borgs continued to express his opposition to meeting alone with Loehrke and Berger, and in response to this opposition, Loehrke told Borgs to go home for the day and report back at 9 a.m. the next morning.

The following day, Borgs met with Loehrke and Jim Wilson, the Respondent's Director of Administration. Loehrke told Borgs that his refusal to meet the previous day constituted gross insubordination and that he was terminated. Loehrke then gave Borgs a letter of termination.[6]

The judge found that the Respondent discharged Borgs for his persistent refusal to comply with Loehrke's directive to meet alone with her and Berger. The judge noted

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 420 U.S. 251 (1975).

[3] All dates hereafter are in 1996 unless stated otherwise.

[4] The memo read as follows:

> Mr. Jim Troxell and Dr. Bob Fraser have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR School-to-Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed – deals with outreach. *Only* support staff assistance is needed in this regard.

[5] In December 1995 Borgs was called into a meeting with Berger, Loehrke, and another supervisor, and was interrogated about his discussions about salary information with other employees. He was also reprimanded at that meeting for having the salary discussions. No exceptions were filed to the judge's finding that this conduct violated Sec. 8(a)(1) of the Act.

[6] In addition to describing the failure to attend the meeting as gross insubordination, the letter also made reference to the January 17 memo, as well as to a "failure to build constructive work relationships with management personnel," and a "resistance to accept responsibility for attempting to attain articulated performance goals." The letter did not refer to these other acts as examples of gross insubordination.

that, under *Weingarten*, employees in unionized work forces are entitled to representation in investigatory interviews which the employee reasonably believes could result in disciplinary action, but under current Board precedent, employees in nonunionized workplaces do not have the right to have a coworker present in similar circumstances. *E. I. DuPont & Co.*, 289 NLRB 627 (1988). Accordingly, the judge found that Borgs had no statutory right to condition his attendance at the meeting on the presence of Hasan, and thus, the Respondent's discharge of Borgs for refusing to attend the meeting did not violate Section 8(a)(1) of the Act.

We agree with the judge's finding that Borgs was discharged for refusing to attend the meeting with Loehrke and Berger.[7] We also agree that the judge accurately applied the relevant Board precedent. After careful consideration, however, we find that precedent to be inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision, and with the purposes of the Act. Consequently, we shall overrule that precedent today and find that the Respondent's termination of Borgs for his attempt to have a coworker present at the meeting was unlawful.

Our examination of this issue begins with the Supreme Court's seminal *Weingarten* decision. There, as noted above, the Court held that an employer violated Section 8(a)(1) by denying an employee's request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The Court, in upholding the Board's finding of a violation, found that the employee's action in seeking representation in such circumstances "falls within the literal wording of Section 7 of the Act that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of mutual aid or protection." Id. at 260. The Court explained further as follows:

> The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. Id.

Read together, these statements explain that the right to the presence of a representative is grounded in the rationale that the Act generally affords employees the opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees.

Because the facts at issue in *Weingarten* involved a request for the presence of a union representative, the Court's decision did not specifically refer to circumstances involving the request for a coworker representative in nonunion settings. The Board, however, has addressed this precise issue on several occasions. In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board found that the *Weingarten* right includes the right to request the presence of a coworker at an investigatory interview in a nonunion setting. In that case, the Board relied on the fact that *Weingarten* emphasized that the right to the assistance of a representative is derived from the Section 7 protection afforded to concerted activity, rather than from a union's right pursuant to Section 9 to act as the employee's representative for the purpose of collective bargaining. Consequently, the Board found that the ability to avail oneself of this protection does not depend on whether the employees are represented by a union.

The Board overruled *Materials Research Corp.*, however, in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), and held there that *Weingarten* principles do not apply in circumstances where there is no certified or recognized union. In that case, the Board specifically rejected the prior decision's reliance on the fact that the *Weingarten* rights are based on Section 7, stating that "[t]he scope of Section 7's protections may vary depending on whether employees are represented or unrepresented. . . ." The Board also expressed the view that extending *Weingarten* rights to employees not represented by a union is inconsistent with the Act because it infringes on an employer's right to deal with employees on an individual basis when no union is present. Id. at 231.

The Board modified the *Sears* rationale in *E. I. DuPont & Co.*, 289 NLRB 627 (1988). In that case, the Board adhered to its position that *Weingarten* rights are not applicable in nonunion settings, but acknowledged that "the statute might be amenable to other interpretations." Id. at 628. Thus, the Board specifically disavowed *Sears* insofar as it held that the Act compels a finding that *Weingarten* rights are applicable only in unionized workplaces. Id. at fn. 8. The Board, however, declined to return to the rule of *Materials Research* for several reasons. First, the Board stated that the Court in *Weingarten* placed the issue in the context of the Act's purpose of redressing the perceived balance of economic power between labor and management, and that this consideration is of lesser significance if the employees are not represented by a union. Second, the Board stated that in a nonunion setting, the employee representative has no obligation to represent the interests of the entire unit, and thus, it is less likely that the representative's presence will safeguard the interests of employees as a group. Id. at 629. Third, the Board stated that it is less likely that the employee representative would have the skills equivalent to those that a union representative would have to provide effective representation to the employee. Id. Finally, the Board stated that the assertion of a *Weingarten* right might be more detrimental to the employee in a nonunion setting if the employer then decides to forego the interview rather than conduct it with an employee representative. The Board explained that, unlike the union-represented employee who had a framework for resolving grievances, the unrepresented employee could

[7] We also note that the Respondent does not contend that Borgs was discharged for any other reason.

lose his only opportunity to present his side of the issue. Id. at 630. Accordingly, while recognizing that the Board's holding in *Materials Research* was not necessarily inconsistent with the purposes of the Act, the Board in *Dupont* declined to return to the holding of that case.

We disagree with the Board's holdings in *Sears* and *Dupont*, and find that a return to the rule set forth in *Materials Research*, i.e., that *Weingarten* rights are applicable in the nonunionized workplace as well as the unionized workplace, is warranted.[8] *Sears* and *Dupont* misconstrue the language of *Weingarten* and erroneously limit its applicability to the unionized workplace. In our view, the Board was correct in *Materials Research* to attach much significance to the fact that the Court's *Weingarten* decision found that the right was grounded in the language of Section 7 of the Act, specifically the right to engage in "concerted activities for the purpose of mutual aid or protection." This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern "that the employer does not initiate or continue a practice of imposing punishment unjustly."[9] Thus, affording *Weingarten* rights to employees in these circumstances effectuates the policy that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978).[10]

We find no merit to the contention raised in *Sears*, and subsequently disavowed in *Dupont*, that the imposition of *Weingarten* rights in these circumstances "wreaks havoc" with the provisions of the Act that enable an employer to deal with employees on an individual basis when no union is present. The Act clearly protects the right of employees—whether unionized or not—to act in concert for mutual aid or protection. Further, as noted above, the right to have a coworker present at the investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment.[11] While an employer is generally free to deal with employees individually in the absence of union representation, an employer may not mask the obstruction of employee efforts to exercise Section 7 rights by asserting a right to deal on an individual basis. See generally, *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844-850 (2d Cir. 1980).

Member Brame contends that, by granting a nonunionized employee the right to have a coworker present in an investigatory interview, we are forcing the employer to "deal with" the equivalent of a labor organization, and that this conflicts with the exclusivity principle embodied in Section 9(a) of the Act. This contention was squarely addressed and soundly rejected by the Third Circuit Court of Appeals in *Slaughter v. NLRB*, 794 F.2d 120 (1986). "The entire argument," the court said, "rests upon a non sequitur." Id. at 127.

> [T]he system of exclusive representation . . . which [it is claimed] . . . would be derogated from by the extension of *Weinarten* to the unorganized, is expressly one of collective bargaining, not of dealing. Accordingly, if, as the Supreme Court held, the employer has no statutory duty to bargain with the *Weingarten* representative, the function of that representative in the unorganized setting cannot be in derogation of the exclusivity principle or any other important statutory policy. Id. at 128.

In other words, even assuming that the role of an employee representative in an investigatory interview is equivalent to "dealing with" the employer, the argument advanced by Member Brame is irrelevant. "Dealing" is not equivalent to "collective bargaining," and the employer is not required to "bargain collectively" with the *Weingarten* representative. As the Third Circuit held, the Section 9(a) exclusivity principle does not limit the Section 7 rights of

[8] We agree with Member Hurtgen that the Board should not reverse important legal doctrine absent compelling considerations for doing so. Contrary to our colleague, however, we find that such compelling considerations are present here because, as explained below, the doctrine infringes on the exercise of Sec. 7 rights and is inconsistent both with Supreme Court precedent and the policies of the Act.

[9] Member Hurtgen asserts that the Court in *Weingarten* could not have contemplated the affording of such a right to employees in a nonunion setting because the Court in its discussion referred to the role played by "the union representative whose participation [the employee] seeks" in safeguarding the interests of "the bargaining unit." These terms, however, are necessary to accurately describe the unionized circumstances that were before the Court in that case. In view of the Court's reference to this right as one grounded in Sec. 7 of the Act, the Court's use of the terms "union representative" and "bargaining unit" does not establish that the Court did not envisage the right to such representation in a nonunion setting.

[10] We disagree with our dissenting colleagues' assertions that Sec. 7 of the Act gives nonunionized employees only the right to seek the assistance of a coworker at an investigatory interview, not the right to the actual assistance. It is the actual presence of the coworker, not the request for one, that affords employees the ability to act in concert for mutual aid or protection. In our view, the right to make such a request is devoid of any substance without a corresponding right to have the request granted.

[11] Member Hurtgen asserts that our holding today alters the balance between an employee's interest in assistance and "an employer's interest in having an unfettered investigation." He fails to state, however, how the presence of such a representative would impair the ability to have an "unfettered investigation." In our view, such speculation does not warrant depriving employees of the opportunity to act for mutual aid or protection in these circumstances.

Member Brame asks why nonunionized employees should be entitled to the presence of a coworker at an investigatory interview when nonunionized employees are not entitled to the presence of a coworker at meetings to discuss other issues. The answer to this question, of course, is that the principles set forth in the Supreme Court's *Weingargten* decision speak only to this specific right. Member Brame's speculation about other circumstances involving nonunionized employees is not encompassed within the *Weingargten* rationale, and is not before us today. Thus, there is no merit to his assertion that our decision today has implications beyond the specific rule enunciated here. In fact, our holding has no greater or less applicability than did the Board's prior holding in *Materials Research.*

nonunionized employees. In any event, if Member Brame insists that we are forcing a nonunionized employer to deal with the equivalent of a labor organization, he must also believe that an employer would violate Section 8(a)(2) of the Act by *voluntarily* allowing an employee to have a coworker present during the investigatory interview. We find this logic to be strained. More important, it misses the point, discussed above, that an employer is completely free to forego the investigatory interview and pursue other means of resolving the matter. Thus, contrary to Member Brame's assertion, there is no obligation to deal with an employee representative of nonunionized employees.

We also find that the concerns raised by the Board in *Dupont* do not warrant allowing an employer to prohibit the exercise of *Weingarten* rights in nonunionized workplaces. Specifically, we take issue with *Dupont's* reliance on the notions that the coworker has "no obligation" to represent the interests of fellow employees, and that the nonunionized coworker is less likely to have the skills necessary to provide representation comparable to that provided by a shop steward or some other union representative. The notion that employees in such circumstances would not be motivated to act in the interests of their fellow workers, or that employees might lack the abilities to offer constructive assistance to the interviewed employee, is wholly speculative.[12] It also misses the point that the employee is free to choose whether to request or forego representation. What is important is the availability of the option. Moreover, Section 7 rights do not turn on either the skills or the motives of the employee's representative. Thus, these supposed concerns do not legitimately warrant foreclosing employees from the opportunity to avail themselves of the protections of the Act.

We also cannot agree with the statement in *Dupont* that extending *Weingarten* rights to the nonunion workplace will actually work to the detriment of employees by encouraging employers to forego the investigatory interview and, thus, leave the aggrieved employee without an opportunity to tell his or her side of the story. 289 NLRB at 630. This too is based wholly on speculation, and assumes the worst in employer motives. In addition, such rationale ignores the fact that employees are not *obligated* to request the presence of a *Weingarten* representative, and—as in the unionized workplace—can freely evaluate the strategic merits of any particular course of action in this regard.

Finally, we find no force in Member Hurtgen's contention that affording *Weingarten* rights to nonunionized employees places an "unknown trip wire" on employers who are legitimately pursuing investigations of employee conduct. Our colleague speculates that employers in nonunionized settings will be completely unaware of an employee's right to a *Weingarten* representative. We do not agree with his speculation. In any event, we fail to understand how an employer's ignorance of employee rights provides a justification for denying those rights to employees.

In sum, we hold today that the rule enunciated in *Weingarten* applies to employees not represented by a union as well as to those that are. We overrule the Board's decision in *Dupont* and return to the standard set forth in *Materials Research Corp*. In addition, we also shall apply the rule enunciated today to the facts of this case and find that the Respondent violated Section 8(a)(1) of the Act by terminating Borgs for insisting on having his coworker, Hasan, present at an investigatory interview. Such application is warranted in view of the well-settled retroactivity doctrine. As the court stated in *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990):

> Generally, a decision which changes existing law or policy is given retroactive effect unless retroactive application would cause "manifest injustice." *NLRB v. Affiliated Midwest Hospital,* 789 F.2d 524 (7th Cir. 1986) (quoting *NLRB v. Lyon & Ryan Ford, Inc.,* 647 F.2d 745, 757 (7th Cir. 1981) [*612] (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)). In determining whether manifest injustice is caused by the retroactive application of a Board rule we consider the following: "the reliance of the parties on pre-existing law, the effect of retroactivity on accomplishing the purpose of the law; and any injustice arising from retroactive application." *NLRB v. Chicago Marine Containers, Inc*., 745 F.2d 493, 499 (7th Cir. 1984). Id. at 611–612.

We find that the application of the *Weingarten* rule in this case will not work a manifest injustice. First, there is no evidence in the record even remotely suggesting that the Respondent was relying on the state of Board law when it decided to take action against Borgs. Second, applying the rule in this proceeding serves to correct effects of the imposition of discipline on an employee for availing himself of the right to engage in protected activity, and thus, serves the purpose of promoting the right of employees to engage in concerted activity for mutual aid

[12] Indeed, Member Brame's dissent relies heavily on such speculation. He speculates that the nonunionized coworker would be more hostile to the employer, less likely to have the same incentives to safeguard the wider interests of fellow employees, and unlikely to be of any assistance to the employer. As mentioned above, such speculation cannot serve as a legitimate basis for depriving employees of the right to act in concert for mutual aid and protection. The likelihood that any particular concerted activity will ultimately achieve its intended result is not the controlling consideration in determining whether that activity is protected by Sec. 7 of the Act. What is important is that employees are afforded the opportunity to "engage in concerted activities for mutual aid or protection." To that end, we find that Member Brame's emphasis on the notion that a coworker representative may not effectively serve the employer's interests reveals a disproportionate focus on the employer's interests at the expense of denying employees their right and opportunity to engage in Sec. 7 activity.

Further, we disagree with Member Brame's assertion that our refusal to engage in similar speculation "flies in the face of *Weingarten* itself." Although the Court mentioned that a knowledgeable union representative "could" be of assistance to the employer, it did not limit this right to circumstances where the representative might be of such assistance.

and protection. Indeed, the purposes of the Act are not served by subjecting Borgs to the continued consequences of his discharge. Finally, we see no great injustice to the Respondent in finding a violation here and requiring the reinstatement of Borgs, particularly in view of the 8(a)(1) findings by the judge that have not been excepted to,[13] as well as those discussed infra, which demonstrate that the Respondent was not receptive to the right of its employees to engage in protected concerted activity.

Accordingly, for all these reasons, we find that by discharging Arnis Borgs for demanding that a coworker accompany him at an investigatory interview, the Respondent violated Section 8(a)(1) of the Act as alleged.[14]

The Reprimand and Discharge of Ashraful Hasan

As discussed above, Hasan worked as a transition specialist for the Respondent's school-to-work transition project. The record shows that, beginning around August 1995 Hasan engaged in concerted activity together with Borgs. From August through December 1995 Hasan and Borgs organized and engaged in a brown bag lunch program whereby employees would get together to discuss matters of mutual concern. Further, in November 1995 Hasan and Borgs started an ethics committee which gave employees an opportunity to address problems concerning employee relations and delivery of service to clients. Two meetings of the ethics committee were held in November 1995, and minutes of the meetings were posted at the Respondent's office.

In addition, sometime prior to October 5, 1995, Hasan reviewed his personnel file and discovered a memo from Berger, dated June 7, 1995, referencing an earlier misunderstanding Hasan and Borgs had with Berger concerning the hiring of an interpreter without following the Respondent's subcontracting procedure. Although Hasan and Borgs believed that the misunderstanding surrounding this incident had been resolved to everyone's satisfaction, the memo stated that Hasan and Borgs had been given verbal warnings for their actions concerning this incident. On October 5, 1995, Hasan wrote a memo to Berger in which he complained about the warnings in the personnel files and demanded an explanation. Hasan gave copies of the memo to Borgs and Loehrke. Shortly thereafter, Berger, with the assistance of Loehrke, sent a responding memo to Hasan which criticized the insubordinate tone of Hasan's memo and accused Hasan of undermining Berger's supervision of Borgs by sending a copy of the memo to him.

Also, as set forth above, Hasan—along with Borgs—prepared the January 17 and 29 memos criticizing Berger's supervision of them. As with Borgs, Hasan was directed to meet with Loehrke and Berger on February 1. Unlike Borgs, however, Hasan agreed to meet alone with them. At this meeting, Loehrke expressed her displeasure with the January 17 memo.[15] Hasan responded by stating that the memo was a needs assessment. Hasan was then given a written warning, stating that the January 17 memo constituted insubordination and that any further acts of misconduct or insubordination by Hasan would result in his immediate discharge.

Thereafter, about March 6 Berger gave Hasan a copy of his evaluation. Hasan did not sign off on the evaluation, and told Berger that he would be adding some comments to the evaluation, as he had done on previous evaluations. About March 13 or shortly thereafter, Berger presented Hasan with written personal performance goals. As with his evaluations, Hasan had some comments to add to the performance goals, and consequently did not sign off on the document upon receiving it from Berger.

On March 25 Hasan was called to Loehrke's office whereupon she advised him that he was terminated.[16] On March 29, Hasan was given a termination letter from Loehrke explaining that over the past 9 months the Respondent had raised concerns with Hasan about his conduct. The letter further indicated that the more serious concerns included Hasan's continued refusal to accept supervision, and Hasan's various confrontations with other staff members. The letter did not discuss or refer to any specific incident, but stated that he was being terminated because of his "demonstrated conduct."

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by reprimanding and terminating Hasan. The judge began his analysis by finding no evidence of animus towards Hasan's involvement with the brown bag lunch program and the ethics committee. The judge further found that these events, as well as the October dispute concerning the memo in the personnel files, although protected, were remote in time and unrelated to the events leading to his discharge.

The judge next found that the January 17 memo to Berger from Hasan and Borgs, although concerted, was not

[13] In addition to the findings discussed supra at fn. 5, there were no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating a rule prohibiting employees from discussing wage information with other employees.

[14] Because we find that the Respondent unlawfully discharged Borgs for attempting to avail himself of the right to have a coworker accompany him at an investigatory interview, we find it unnecessary to pass on the General Counsel's contention that the Respondent's discharge of Borgs was unlawful even absent a return to the rule set forth in *Materials Research Corp.*

Because we find that the reason for Borgs' discharge was his refusal to participate in an investigatory interview without the presence of a coworker, the appropriate remedy is reinstatement with backpay. *Safeway Stores, Inc.*, 303 NLRB 989 (1991). Thus, the instant case is distinguishable from *Taracorp., Inc.*, 273 NLRB 221 (1984), and its progeny, which hold that an employee denied his *Weingarten* rights is not entitled to reinstatement and backpay if he has been discharged for misconduct or any other nondiscriminatory reason.

[15] Hasan testified that Loehrke expressed her annoyance with the January 29 memo. Loehrke testified, however, that she only referred to the January 17 memo at the meeting. The judge did not resolve this discrepancy in the testimony.

[16] Hasan testified that he was given no reason for his termination at the meeting. Loehrke's notes state that she raised the failure to sign the performance objectives at the meeting.

activity protected by the Act. Specifically, the judge rejected the assertion that the memo was a needs assessment, and instead found it to be an attempt by Hasan and Borgs to dismiss Berger as their supervisor on the project. The judge also regarded the January 29 memo as nothing more than an after-the-fact attempt at damage control. Thus, the judge found the memo writing was not protected because it failed to raise concerns about the quality of the project or of Berger's supervision. Accordingly, the judge found the Respondent's reprimand of Hasan for this conduct did not violate Section 8(a)(1).

Finally, the judge noted that the record showed that Hasan had been involved in several incidents having nothing to do with protected activity, including the incidents involving the hiring of the interpreter, his demands for preferential clerical assistance, an incident in which Hasan was accused of not showing sensitivity towards the parents of an agency client, and Hasan's failure to sign the Respondent's statement of performance objectives. In view of these incidents, as well as the circumstances surrounding the January memos, the judge concluded that there was no evidence to support an inference that animus towards protected activity was a motivating factor in the Respondent's decision to discharge Hasan. Accordingly, the judge found that the Respondent's discharge of Hasan did not violate Section 8(a)(1) of the Act.

We disagree with the judge's finding that Hasan's reprimand and discharge were lawful. Applying the principles set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we find, contrary to the judge, that the General Counsel has shown that Hasan's protected activity was a motivating factor in the Respondent's decision to reprimand and thereafter terminate him, and that the Respondent has failed to show that it would have taken this action against Hasan even in the absence of his protected activity.

We find error with the judge's primary finding with respect to Hasan, i.e., that the January 17 memo by Hasan and Borgs did not constitute protected concerted activity. Specifically, we disagree with the finding that the memo was not protected because it was an attempt to dismiss Berger as their supervisor. Even assuming that was the sole or primary purpose of the memo, such purpose does not remove the conduct from the protections of the Act. Indeed, the attempt by employees to cause the removal of their supervisor is protected when "it is evident that [the supervisor's conduct] had an impact on employee working conditions." *Caterpillar, Inc.*, 321 NLRB 1178, 1179 (1996), vacated as moot (March 19, 1998), citing *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987). Clearly, Berger's supervisory duties had a significant impact on Hasan's terms and conditions of employment, as evidenced by the warnings he received, his evaluations, and his ultimate discharge.[17]

We also find, contrary to the judge, that the January 17 memo was inextricably intertwined with the January 29 memo, which also implicated terms and conditions of employment by its discussion of the problems they were having with Berger. Thus, insofar as Loehrke and Berger had read both memos by February 1, they fully understood that the issues raised in the January 17 memo were not separate from the concerns about Borgs and Hasan were being treated by their supervisor as set forth in the subsequent memo.[18] Thus, the memo writing clearly was an attempt by Hasan and Borgs to raise issues related to their conditions of employment, and, consequently Loehrke's reprimand of Hasan for engaging in this conduct violated Section 8(a)(1) of the Act.[19]

We further find that, in view of our finding that Hasan's involvement in the January 17 memo constitutes protected concerted activity, the Respondent's termination of Hasan was unlawful. Indeed, as noted above, the Respondent placed Hasan on the verge of termination for his involvement with the memo, as evidenced by the formal reprimand which included the warning that any other acts of misconduct would result in his termination. Also, Hasan's termination letter referred to concerns the Respondent had raised about Hasan's conduct over the past 9 months, and during this period Hasan had angered the Respondent by protesting the written warnings placed into his and Borgs'

[17] We find no merit to Member Hurtgen's contention that the January 17 memo was unprotected because the General Counsel did not establish that the memo related to supervisory conduct affecting the employees. To the extent that the Respondent could have initially harbored some doubt as to whether the memo was related to Berger's impact on Hasan and Borgs' terms and conditions of employment, any such doubt was clearly laid to rest by the memo Loehrke received on January 29. As noted above, that memo elaborated on the assertion made in the January 17 memo, and specifically referenced issues such as Berger's use of threatening and abusive language towards employees, Berger requiring Hasan to personally pay for his clients' medical services, critical allegations that Berger placed in Hasan's personnel file, and Berger's critical comments about Hasan's salary negotiations. Thus, neither *Lutheran Social Services*, 250 NLRB 35 (1980), nor *Hoytuck Corp.*, supra, cited by our colleague, supports his position, because the Board held in both cases that such activity is protected when the supervisor's conduct relates to the employees' conditions of employment.

[18] In agreeing with the judge's finding that the January 29 memo was an after-the-fact attempt at damage control, Member Brame contends—at least implicitly—that the January 17 memo must have related to something other than supervisory conduct affecting the employees. There is no evidence in support of this contention. To the contrary, the fact that the Respondent took no action until after receiving the January 29 memo reasonably suggests that, at the time it disciplined Hasan on February 1, the Respondent understood that both memos related to supervisory conduct affecting the employees. Consequently, we find that the cases cited by Member Brame in his dissent do not support a finding that Hasan's discharge was lawful.

[19] Because the memos of January 17 and 29 are inextricably intertwined, we find it unnecessary to resolve the discrepancy in the testimony as to which of the memos Loehrke expressed her annoyance with at the February 1 meeting with Hasan.

personnel files. We agree with the judge that this conduct by Hasan constituted protected activity. Thus, it is clear that the Respondent's animus towards Hasan's protected activity was a motivating factor in its decision to terminate him. Accordingly, we find that the General Counsel has established a prima facie case under *Wright Line* that Hasan's discharge was unlawful.

We further find that the Respondent has failed to sustain its burden under *Wright Line* of showing that it would have discharged Hasan even absent his protected concerted activity. The Respondent contends that it discharged Hasan because he refused to sign the statement of personal project objectives Berger gave him. It is apparent, though, that the discharge was not solely due to the failure to sign the performance objectives, but rather was linked to the Respondent's anger at Hasan for his protected activity, especially his involvement with the January 17 memo. Indeed, Loehrke testified that the failure to sign was the "final straw" for her. Further, as noted above, Hasan was warned that *any* future acts of misconduct would result in his discharge, thus, further suggesting that the failure to sign would not, by itself, warrant discharge. Moreover, we note that Hasan's termination letter made no reference to the failure to sign the performance objectives, thus, casting further doubt as to whether the Respondent was actually discharging him for that reason, as it contends. In view of these facts, we are unable to conclude that the Respondent would have discharged Hasan in the absence of his protected activity, and accordingly find that its discharge of Hasan violated Section 8(a)(1) of the Act.

ORDER

The Respondent, Epilepsy Foundation of Northeast Ohio, Cleveland, Ohio, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning concerted activity protected by the Act.

(b) Issuing disciplinary warnings to employees for disclosing or discussing their wages with other employees.

(c) Threatening employees with reprisals for disclosing or discussing their wages with other employees.

(d) Maintaining a rule prohibiting employees from disclosing or discussing their wages with other employees.

(e) Issuing disciplinary warnings to employees for engaging in protected concerted activities.

(f) Discharging employees for engaging in protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its policy prohibiting employees from discussing their wages with other employees.

(b) Within 14 days from the date of this Order, offer Arnis Borgs and Ashraful Hasan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Arnis Borgs and Ashraful Hasan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed down the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

In *E. I. DuPont & Co.*, 289 NLRB 627 (1988), the Board held that *Weingarten*[1] rights do not apply to employees in nonunion facilities. This principle has been followed since that time, and no court has disagreed with it. Nor is there a showing that the principle has led to in-

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 420 U.S. 251 (1975).

dustrial strife. Despite all of this, my colleagues now abruptly reverse precedent and apply *Weingarten* to nonunion facilities. By so doing, they take away from a nonunion employer its heretofore unfettered right under the Act to deal individually with its employees.

Initially, I note that there are values in having laws that are stable, predictable and certain. Thus, we should not reverse important legal doctrine in the absence of compelling considerations for doing so.

In finding such compelling considerations, the majority says that extant law "infringes upon Section 7 rights and is inconsistent both with Supreme Court precedent and the policies of the Act." I disagree. As discussed below, Section 7, at most, protects nonunion employees in their *seeking* assistance at an investigatory interview.[2] Section 7 does not require the employer to *accede* to that request. As also discussed below, neither Supreme Court precedent nor the Act compels the employer to accede to the request. Thus, the employer has a right to decline the request, and to proceed with the interview with the employee alone. If the employee refuses to be interviewed, he/she is insubordinate and can be disciplined for such insubordination.

To the extent that there are compelling considerations, they point toward preserving the status quo. These considerations are set forth in *Dupont*, and there is no need to repeat them here. I need add only a few further thoughts, and a refutation of the arguments of my colleagues.

First, let us be clear that the issue is *not* whether an employee has a Section 7 right *to seek* the assistance of a coemployee at an investigatory interview. I assume arguendo that there is a Section 7 right to seek such mutual aid or protection, and that an employer therefore could not discharge an employee for seeking that assistance. However, the issue here is whether the employer is *obligated to grant* the employee's request. That is, does federal law forbid a nonunion employer from dealing individually with an employee during an interview with that employee? Phrased differently, does the employer violate the Act if the employer requires the employee to attend the interview by himself, and discharge the employee for insubordination if he refuses? In *Dupont*, those questions were answered in the negative, and my colleagues would now answer them in the affirmative.

The current law is well grounded in *Weingarten* itself. As noted above, the Supreme Court held that, in a unionized setting, the employee is entitled to union representation at the interview. The Court's rationale is instructive:

> The union representative whose participation [the employee] seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.

Clearly, in a unionized setting, the "union representative" is charged with "safeguarding . . . the interests of the entire bargaining unit." Equally clearly, in a nonunion setting, there is no "union representative," and there is no "bargaining unit." Thus, it is plain that the Court in *Weingarten* did not envisage rights to representation in a nonunion setting.

Further, the differences between a unionized workforce and a nonunion workforce are clear and obvious. The employer in the former situation acts at its peril when it deals directly with an employee with respect to an employment-related matter. By contrast, in a nonunion setting, the employer is completely free under the Act to deal with an individual employee as it wishes.[3] My colleagues have now obliterated that clear line. They forbid the nonunion employer from exercising its management right to interview an employee on an individual basis.

There is another difference between a unionized context and a nonunion context. As the Court noted in *Weingarten*, the presence of a union representative in a unionized context may actually help the interview process. The union representative knows the discipline provisions of the collective-bargaining agreement, and can offer those relevant insights at the interview. Also, the union representative knows the grievance-arbitration provisions of the agreement, and can apprise the employer of the risks that it faces if discipline is imposed.

None of this is true in a nonunion setting. There is no collective-bargaining agreement, and there is no grievance-arbitration provision under such an agreement. Of course, this is not to say that an employee-assistant in a nonunion setting would be unintelligent or unhelpful. It is simply to recognize that such an assistant is not offering the same insights as does a union representative who operates under a union contract containing discipline provisions and grievance-arbitration procedures.

My colleagues have altered the delicate balance achieved in *Weingarten*. That balance involves the "difficult and delicate responsibility of reconciling conflicting interests of labor and management."[4] More particularly, the balance is between the individual employee's interest in assistance at the interview and the employer's interest in having an unfettered investigation of allegations of misconduct.

In striking that balance, the Court noted, inter alia, the unions' interest in representing all of the unit employees, the expertise and special knowledge of the union representative, and the industrial practice under which many collective-bargaining agreements contain "*Weingarte*—type" provisions. Of course, none of these factors is present in a

[2] The term "interview," as used here, is used in its *Weingarten*, sense, i.e., an investigatory interview of an employee in circumstances which reasonably lead the employee to believe that discipline might result.

[3] See *Linden Lumber v. NLRB*, 419 U.S. 301 (1974); and *J. I. Case v. NLRB*, 321 U.S. 332 (1944).

[4] *Weingarten* at 267.

nonunion situation. Thus, the delicate balance in favor of representational assistance in a unionized situation tilts decidedly the other way in a nonunion situation.

Moreover, by grafting the representational rights of the unionized setting onto the nonunion workplace, employers who are legitimately pursuing investigations of employee conduct will face an unknown trip-wire placed there by the Board. Employers in a nonunion setting will generally be completely unaware of this right to representation that the Board is imposing on them. The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds.

Finally, my colleagues assert that it is speculative to say that the presence of a third party would impair the interview. In this regard, my colleagues have missed the point. In a nonunion setting, *the employer* makes the judgment as to whether the interview would be enhanced or impaired by the presence of a third party. If the employer makes the judgement that the interview would be impaired, it is not the role of the Government to say that this judgement is incorrect.

The same point obtains with respect to the majority's assertion that the employer is free to forego the interview. Again, if the employer makes the judgment that an interview is more helpful than a noninterview (in terms of ascertaining facts), that is a judgement for the employer to make.

For all of the foregoing reasons, I would uphold extant law, and find no violation.[5] In addition, even if extant law is now changed (as it is by my colleagues), it is most unfair to apply the new law to Respondent in this case. The Respondent acted consistently with extant law when it denied Borgs' request for representation. Rather, it was Borgs who acted contrary to legal principles when he insisted on representation. In these circumstances, it is "manifestly unjust" to now say that Respondent was the one who acted unlawfully.[6]

Discharge of Hasan

I agree with the judge that the discharge of Hasan was lawful. The judge found, as a fact, that Hasan was discharged because of the January 17 memo from Hasan and Borgs to Berger (copy to Executive Director Loehrke). The judge also found, as a matter of law, that the memo was unprotected. Clearly, the judge was correct. The memo sought the dismissal of Berger as a supervisor. The act of seeking the dismissal of a supervisor is unprotected, unless there is a showing that the dismissal is sought as a means of rectifying supervisory conduct which has a direct adverse impact on the employee's terms and conditions of employment.[7] Here, the memo did not even mention any adverse impact of Berger's conduct. It simply declared that Berger's supervision was no longer required. Indeed, the memo expressed gratitude for Berger's past services.

My colleagues misread my position with respect to the January 17 memo. I am not saying that the letter seeking the supervisor's discharge must itself refer specifically to the manner in which the supervisor affects employees. Rather, I am saying that the General Counsel must establish, *in some fashion*, that supervisory conduct affected the employees, and that this was the reason for their seeking the discharge of the supervisor. In the instant case, this showing is not made in either the January 17 memo or in any other way.

Hoytuck, 285 NLRB 904 (1987), and *Lutheran Social Services*, supra, support my position. In *Hoytuck*, the Board held that the employee complaints against the supervisor were protected "because it is evident that . . . [the supervisor's] conduct had an impact on employee working conditions." The same point is made in *Lutheran Social Services*, supra. The employee activity against supervisors was unprotected because "employees were protesting management policies that did not directly affect them as employees."[8]

In sum, the January 17 memo was unprotected because it sought the discharge of supervisor Berger. There is no showing that the effort to discharge the supervisor was prompted by supervisory conduct affecting employees' terms and conditions of employment. The January 17 memo did not become protected by reason of the later memo of January 29. The Respondent was critical of the January 17 memo, and thus, Hasan and Borgs wrote another memo on January 29. As the judge correctly found, this memo was simply an after-the-fact attempt at damage control. In any event, the January 29 letter did not raise the anger of the Respondent. Indeed, the Respondent, through Loehrke, met with Hasan to discuss that memo. It was the January 17 letter that raised the anger of Respondent, and that letter was unprotected.

Finally, although Hasan may have engaged in earlier protected activities, the judge found that they were not the cause of the discharge. Indeed as my colleagues concede, the discharge was linked to the Respondent's anger over the January 17 memo.

[5] I do not pass on the issue of whether the Act compels the result that I have reached. See *Slaughter v. NLRB*, 876 F.2d 11 (1986) (the court said that Board erroneously assumed that the Act mandated this result). Rather, I simply conclude that the policies of the Act strongly militate in favor of that result.

[6] *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990).

[7] See *Lutheran Social Services*, 250 NLRB 35, 41 (1980).

[8] With respect to *Caterpillar*, 321 NLRB 1178, 1179 (1996), I do not agree with the decision in that case, and I note that the decision was vacated.

MEMBER BRAME, dissenting in part.[1]

I.

A. Introduction

This case presents the Board with yet another opportunity to consider whether the right of unionized employees to have a union representative present, on request, at investigatory interviews with employers should be extended to the nonunionized workplace.[2] The General Counsel has requested that the Board overrule its most recent decision in this area, holding that nonunionized employees do not enjoy such a right,[3] and return to a past interpretation of the Act, which would bestow this right on such unrepresented employees.[4] My colleagues in the majority have decided to do just that. The National Labor Relations Act (the NLRA or the Act), however, does not provide for such protection for nonunionized employees, and to interpret it in such a way both disrupts the balance between the powers of labor and management struck by Congress in the Act and the balance struck by this Board in its long history of interpreting the Act.

Finding an 8(a)(1)[5] violation by the Respondent in this case for its discharge of an employee who refused to meet with his supervisors without a coworker present creates a representational right in employees who have not made the choice to be represented by a union. This decision endows nonunionized employees with a right of representation in one specific situation, although they have not elected a union to represent them in any of their other dealings with management. Such a grant of rights wreaks havoc with the scheme created by the Act, and a proper interpretation of the Act would require a finding that such unrepresented employees are not entitled to a special right of representation in this one situation. Forcing a nonunionized employer to deal with an employee representative, when it is properly free to deal individually with its unrepresented employees with regard to all other terms and conditions of employment, is simply an incorrect interpretation of the Act. The mere fact that unionized employees enjoy a Section 7 right to act in concert for mutual aid or protection by having a union representative at investigatory interviews on request does not mean that unrepresented employees enjoy the same right. As explained in detail below, the scope of Section 7 rights can and does vary based on whether employees are unionized.

Additionally, even if my colleagues' approach were a permissible interpretation of the Act, it is not a reasonable one. As explained in detail below, there are very specific reasons for allowing organized employees to have a union representative present at investigatory interviews that employees reasonably believe may result in discipline. Such a union representative is knowledgeable and experienced and has the ability to help both the individual employee and the employer as well as the ability to safeguard the interests of the entire bargaining unit. A mere coworker brings few if any of the same qualities to the table. Because I do not think that the majority's interpretation of the Act is a correct one or a reasonable one, I dissent from their decision to return to what I believe to be an unsound rule.

My colleagues in the majority would also find that the second discharge at issue in this case violated Section 8(a)(1). I cannot agree with this decision either. The second discharge resulted from an employee's attempt to remove his supervisor. Such conduct, even when concerted, is not protected unless the employee is protesting activity by a supervisor that has a direct impact on the employee's working conditions. Here, the protest at issue, a memo sent to the supervisor, referenced no supervisory conduct whatsoever, but merely asserted that the supervisor was no longer necessary. Because an attempt to remove a supervisor is not protected activity, I must dissent from my colleagues' determination that the Respondent violated the Act when it discharged this second employee.

B. The Facts and Findings

In 1993 the Epilepsy Foundation of America (EFA) selected the Respondent, an EFA affiliate, to conduct a 3-year project related to school-to-work transitions for teenagers with epilepsy (the project). The respondent's executive director, Christine Loehrke, was responsible for overseeing the project, and Respondent's director of vocational services, Rick Berger, acted as the project's on-site supervisor. The two employees at issue in this case are Ashraful Hasan, a full-time transition specialist on the project, and Arnis Borgs, an employment specialist.

During 1995 and 1996 Hasan and Borgs engaged in certain conduct that is at issue in this case. First, between

---

[1] I join my colleagues in affirming the finding of 8(a)(1) violations to which no exceptions were filed, including violations based on the Respondent's coercive interrogation of employee Arnis Borgs, its issuing of disciplinary warnings and threats to Borgs for his discussion of wage information with other employees, and its promulgation of a rule that prohibited employees from discussing wage information with other employees.

[2] This right in the unionized setting was approved by the United States Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). There, the Court defined an "investigatory interview" as an interview with the employer that the employee reasonably believes may result in his or her discipline. Id. at 256 (citing *Quality Mfg. Co.*, 195 NLRB 197 (1972); and *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

[3] *E. I. DuPont & Co.*, 289 NLRB 627 (1988), review denied sub nom. *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989).

[4] *Materials Research Corp.*, 262 NLRB 1010 (1982).

[5] Sec. 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. Sec. 158(a)(1). Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

29 U.S.C. Sec. 157.

August and December 1995, they took part in a brown bag lunch program through which employees met approximately six times during lunch hours to talk about issues that concerned them. Also, in November 1995 Borgs and Hasan initiated an ethics committee, which met twice and gave employees a chance to address problems with employee relations and client-service delivery.

On June 7, 1995, Supervisor Berger wrote a memorandum regarding an incident involving Hasan, Borgs, and an interpreter and stating that Hasan and Borgs had been given verbal warnings for their conduct in relation to that incident.[6] Hasan and Borgs claim that they discussed the incident with Berger, who told them that nothing negative would be placed in their personnel files. However, Hasan later found the warning memo in his file. In response, Hasan wrote a memo to Berger with copies to Loehrke and Borgs. Berger prepared a memo in response, apparently with Loehrke's assistance, which criticized the "insubordinate tone" that Hasan had employed in his memo and complained about Hasan's having undermined Berger's supervision of Borgs by sending Borgs a copy.

With this background, Hasan and Borgs then engaged in the conduct most directly relevant to the discharges in this case. On January 17, 1996, Hasan and Borgs prepared and sent a memo to Berger, which stated that his supervision of the project was no longer required.[7] They also sent a copy of the memo to Loehrke, although she was away from the office at the time. On learning that Berger and Loehrke were displeased with this January 17 memo, Hasan and Borgs, on January 29, submitted an eight-page memo to Loehrke, the stated intention of which was "to elaborate upon the reasons underlying" the January 17 memo. This January 29 memo detailed Hasan's and Borgs's alleged concerns about Berger.

Thereafter, on February 1, 1996, Berger informed Hasan and Borgs that Loehrke wanted to meet with each of them individually with Berger present. Hasan informed Berger that they were in the midst of a meeting and could not meet with Loehrke at that time. Loehrke herself then came to Hasan and Borgs and told them that they must meet with her and Berger. When Loehrke informed Borgs that he must meet with them, he refused and said that he would meet alone with Loehrke but not with both Loehrke and Berger. Loehrke informed Borgs that he must meet with both of them together. Borgs then asked if Hasan could attend the meeting with him, but Loehrke rejected his request. When Borgs continued to refuse to meet alone with Loehrke and Berger, Loehrke told him to go home for the remainder of the day and to return the next morning. Borgs was then told to surrender his key to the office and was escorted out of the building.

When he returned the next day, Borgs met with Loehrke and Jim Wilson, the Respondent's director of administration. At that time, Loehrke informed him that his refusal to meet with her and Berger the previous day was gross insubordination and that he was terminated from employment. Borgs was also given a termination letter, which described his "gross insubordination" in failing to meet with Loehrke and Berger, noted that his involvement in the January 17 memo demonstrated an unwillingness to accept supervision, and explained that he had "fail[ed] to build constructive work relationships with management personnel" and had demonstrated a "resistance to accept[ing] responsibility for attempting to attain articulated performance goals."

Unlike Borgs, Hasan did meet with Loehrke and Berger on February 1. At that time, Loehrke expressed her unhappiness with the January 17 memo,[8] and Hasan told her that the memo was a needs assessment. Hasan also received a written warning, which stated that the January 17 memo constituted gross insubordination and that further acts of misconduct or insubordination would result in his immediate termination.

Later, on March 25 Loehrke informed Hasan that he was terminated.[9] Hasan received a letter signed by Loehrke when he returned to pick up his belongings on March 29. The letter explained that he had been terminated as a result of his conduct over the previous 9 months, specifically his refusal to accept supervision on the project and his confrontations with other staff members.

The General Counsel asserts that the Respondent discharged Borgs and Hasan because they had engaged in concerted activities and that the Respondent thereby violated Section 8(a)(1) of the Act. The judge indeed found that the Respondent did in fact discharge Borgs in retalia-

[6] The precise details regarding this incident are not relevant to the issues in this case.

[7] The memo stated:

> Mr. Jim Troxell [an EFA representative monitoring the project] and Dr. Bob Fraser [responsible for providing data processing and analytical services to the project] have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR [National Institute of Disability and Rehabilitation Research, responsible for the research grant] School-to-Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed—deals with outreach. *Only* support staff assistance is needed in this regard.

[8] As my colleagues note, there is some confusion in the record as to whether Loehrke expressed her displeasure with the January 17 memo or both that memo and the January 29 memo at this meeting with Hasan and Berger.

[9] Although Hasan testified that he was given no reason at this time for his termination, Loehrke's notes indicate that she did raise with him an incident that occurred earlier in March in which Hasan failed to sign performance objectives given to him by Berger. Hasan apparently did not sign off on the objectives because he wanted to add his own handwritten comments to them.

tion for protected, concerted activities in which he had earlier engaged.[10] However, the judge also found that the Respondent would have proceeded with its discharge of Borgs even in the absence of his protected activities and that, therefore, the Respondent did not violate the Act when it terminated Borgs's employment. First, the judge found that the January 17 memo did not constitute protected, concerted activity, and thus, that discipline resulting from that memo was not a violation. Second, the judge determined that Borgs's refusal to meet with Loehrke and Berger on request constituted insubordination for which he properly could be disciplined under the Act despite his request to have Hasan present at the meeting.

Similarly, the judge determined that Hasan's discharge did not violate the Act. First, the judge found that the General Counsel had failed to establish that the Respondent bore Hasan any animus based on his activities relating to the brown bag lunch program, the ethics committee, or the interpreter incident. Additionally, the judge noted that these activities "were remote in time and unrelated to the events that led to [Hasan's] discharge." Second, the judge concluded that Hasan's part in the January 17 memo did not constitute protected, concerted activity as argued by the General Counsel. In this regard, the judge noted that the January 17 memo did no more than attempt to dismiss Berger as Hasan's and Borgs's supervisor and did not raise concerns about the project or Berger's supervision thereof. Additionally, the judge refused to accept Hasan's and Borgs's characterization of the January 17 memo as a needs assessment and instead found that that characterization as well as the detailed January 29 memo were in fact mere "after-the-fact attempts at damage control."

My colleagues find that both discharges at issue in this case violated Section 8(a)(1) of the Act. With regard to Borgs's discharge, my colleagues determine that his request to have Hasan present at the meeting with Loehrke and Berger was an exercise of his Section 7 rights[11] and that the Respondent's insistence that he meet without Hasan or be terminated, restrained, interfered with, or coerced him in the exercise thereof, and thus, violated Section 8(a)(1). In order to reach this finding, of course, my colleagues are forced to overrule Board precedent holding that unrepresented employees do not have a right to representation by a coworker at an investigatory interview with an employer even if they have a reasonable belief that the interview will result in disciplinary action. Because I find that the Act does not provide for such a right in unrepresented employees, I cannot join my colleagues' decision in this regard.

With respect to Hasan's discharge, my colleagues find that the Respondent violated Section 8(a)(1) because the January 17 memo was protected, concerted activity and additionally because that memo was "inextricably intertwined" with the January 29 memo, which clearly related to terms and conditions of employment. My colleagues therefore determine that the Respondent's animus toward Hasan's protected activity in writing the memos and in engaging in earlier concerted conduct with Borgs was the motivating factor behind its termination of his employment. Again, I cannot join in my colleagues' decision; I agree with the judge that the January 17 memo was not protected, concerted activity and that, therefore, Hasan's discharge, even if resulting from his involvement in the memo, was not violative of the Act.

II.

A. Borgs's Discharge

1. The *Weingarten* right

The issue of representation during investigatory interviews initially arose in cases involving unionized workforces. In 1975, the United States Supreme Court, in *NLRB v. J. Weingarten, Inc.*,[12] approved of the Board's approach to such cases. In *Weingarten*, the employer had called in an employee for questioning regarding allegations that she had taken money.[13] During the course of the questioning, the employee several times asked the manager to call in the union shop steward or another union representative, and the manager refused to do so.[14] The Supreme Court held that previous Board decisions finding that employees have a Section 7 right "to refuse to submit without union representation to an interview which [they] reasonably fear[] may result in [their] discipline"[15] set forth "a permissible construction of" Section 7's "concerted activities for . . . mutual aid or protection" language.[16]

In accepting the Board's construction of the Act in this regard, the Court laid out "the contours and limits of the statutory right" as established by the Board in previous cases.[17] The Court noted that the right of an employee to union representation on request at an investigatory interview "inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection."[18] The Court then went on to explain that this right to representation would arise only when an employee actually requests representation[19] and only when the employee has a reasonable belief that the investigation will result in some sort of

[10] The activities that the judge found to be protected and concerted involved attempts by Borgs to convince the Respondent to increase the amount that it paid employees for mileage reimbursements and Borgs's discussions with other employees regarding salaries.

[11] For the full text of Sec. 7, see supra fn. 5.

[12] 420 U.S. 251 (1975).

[13] Id. at 254.

[14] Id.

[15] Id. at 256 (citing *Quality Mfg. Co.*, 195 NLRB 197 (1972); and *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

[16] Id. at 260.

[17] Id. at 256 (citing *Quality Mfg Co.*, 195 NLRB 197 (1972); and *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

[18] Id.

[19] Id. at 257.

disciplinary action.[20] The Court then explained the employer safeguards that the Board had built into the representational right: First, although an employer may not force an employee to take part in an interview without his or her union representative, the employer is free to refuse to conduct the interview with a union representative present and instead proceed with the investigation without interviewing the employee at all.[21] Second, the employer is not under any duty to engage in bargaining with a union representative who attends an investigatory interview.[22]

With these confines, previously limned by the Board, the Supreme Court accepted what has now become known as the *Weingarten* right of a represented employee to have present, upon request, a union representative at an investigatory interview with his or her employer. In the course of its opinion, the Supreme Court explained the relationship between this right and Section 7 of the Act. As the Court noted, when an employee seeks a union representative's assistance at an investigatory interview, his or her conduct "clearly falls within the literal wording of § 7" even though the employee may be the only person with "an immediate stake in the outcome" of the interview and even though he or she is seeking "aid or protection" against the possibility of *individual* discipline.[23] As the Court explained, the *union representative* from whom the individual employee seeks aid or protection is

> safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.[24]

The Court went on to explain that recognizing this *Weingarten* right effectuates one of the NLRA's most important purposes—eliminating the "inequality of bargaining power between employees . . . and employers."[25] Additionally, the Court emphasized that recognizing this right at the time of an investigatory interview can benefit the employer as well as the employee, because "[a] knowledgeable union representative could . . . elicit[ ] favorable facts, and save the employer production time by getting to the bottom of the incident."[26] In this regard, the Court quoted favorably language noting that participation of a union representative could assist both parties by helping to clarify the situation, the facts, and any collective-bargaining agreement clause that might be in issue and by limiting the filing of grievances by encouraging discussion at this early stage.[27]

Finally, after reiterating that the Board's construction of the Act was an interpretation that was "at least permissible," although perhaps not required, and that the Board had "engage[d] in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," the *Weingarten* Court noted that the right at issue was "in full harmony with actual industrial practice."[28] In this regard, the Court explained that many collective-bargaining agreements already contained provisions according employees this right to representation and that "a 'well-established current of arbitral authority'" had upheld such a right even when it was not explicitly provided for in a collective-bargaining agreement.[29]

2. Subsequent Developments

a. Materials Research Corp. and extending the Weingarten right

Since *Weingarten*, the Board has struggled with the issue of whether to extend the right approved in that case to a situation like the one in the present case in which an employee in a nonunionized workplace requests representation by a coworker at an investigatory interview with his or her employer. In 1982, the Board offered what appeared at the time to be its definitive answer to this issue. In *Materials Research Corp.*,[30] the Board for the first time explicitly found a right to representation by a coworker at an investigatory interview in a nonunionized workplace. The Board acknowledged that the Supreme Court's decision in *Weingarten* had referred only to *union* representatives but determined that that was due to the particular fact pattern under consideration there and not to any desire on the part of the Court to limit the right to such a setting.[31] The *Materials Research* majority reasoned that, because the *Weingarten* Court had grounded the representational right in employees' Section 7 rights, nonunionized employees should be accorded the same right as, for the most part, Section 7 protections do not vary based on whether

[20] Id. at 257–258.
[21] Id. at 258.
[22] Id. at 258–260.
[23] Id. at 260.
[24] Id. at 260–261 (footnote omitted). See also id. at 261 fn. 6 where the Court quoted the following from a law review article:

> The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering [a] foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected. The presence of a union steward allows protection of this interest by the bargaining representative.

Id. (quoting Comment, *Union Presence in Disciplinary Meetings*, 41 U. Chi. L. Rev. 329, 338 (1974)).
[25] Id. at 261–262 (quoting 29 U.S.C. Sec. 151).
[26] Id. at 262–263.
[27] Id. at 262–263 fn. 7 (quoting *Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958); and *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 651 (1965)).
[28] Id. at 266–267 (quoting *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957) (citations omitted)).
[29] Id. at 267 (quoting *Chevron Chemical Co.*, 60 Lab. Arb. 1066, 1071 (1973)).
[30] 262 NLRB 1010 (1982).
[31] Id. at 1012.

one is represented by a union.[32] The Board then pointed to its earlier decision in *Glomac Plastics, Inc.*,[33] a case not clearly involving unrepresented employees[34] but in which the Board nonetheless stated that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation."[35] The Board further noted, again, that its decision in this regard was "buttressed" by Justice Powell's dissenting opinion in *Weingarten* and his statement therein that the representational right would exist in a nonunionized setting as well.[36]

The Board then held that *Weingarten* "compels" a finding that unrepresented employees have a right to have a coworker present at an investigatory interview.[37] In reaching this conclusion, the *Materials Research* majority noted specifically the following language from *Weingarten*:

> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."[38]

The majority then went on to explain that these considerations come into play regardless of whether an employee is represented by a union and that unrepresented employees may have an even greater need for support during an investigatory interview.[39] The majority explained that unrepresented employees are without the safeguards of a collective-bargaining agreement, which checks an employer's ability to act in an unjust or arbitrary way, and without the protections afforded by a grievance-arbitration procedure.[40] According to the *Materials Research* majority, therefore, unrepresented employees should be able to look to coworkers for assistance during an investigatory interview in order to counteract this imbalance of power between employers and unrepresented employees.[41]

Chairman Van de Water and Member Hunter both filed vigorous dissenting opinions in *Materials Research*. In his dissent, Chairman Van de Water pointed out initially that employers are not statutorily obligated to recognize a representative of their employees unless that representative had been recognized by the employer or certified by the Board and that, without a recognized or certified union, employers are free to deal with employees individually.[42] Conversely, when a union has been recognized or certified, an employer, under Section 9(a) of the Act, is required to deal with the union rather than with individual employees on matters related to terms and conditions of employment.[43] As Chairman Van de Water explained, previous cases, dealing with the right of unionized employees to representation at investigatory interviews, had recognized that an employer's refusal to allow an employee's request for a representative at such an interview frustrates the employee's right not to deal individually with the employer when the collective-bargaining relationship requires the employer to deal with the employee's representative.[44] Chairman Van de Water then noted that the Supreme Court's decision in *Weingarten* was also cen-

[32] Id. The Board also noted that in its pre-*Weingarten* decisions in *Quality Mfg. Co.*, 195 NLRB 197 (1972), and *Mobil Oil Corp.*, 196 NLRB 1052 (1972), in which the Board had recognized a right to union representation in investigatory interviews, it had also grounded the right in an employee's right under Sec. 7 to engage in concerted activity for mutual aid or protection. *Materials Research*, 262 NLRB at 1013.

[33] 234 NLRB 1309 (1978), remanded by 592 F.2d 94 (2d Cir. 1979), supplemented by 241 NLRB 348 (1979), enfd. 600 F.2d 3 (2d Cir. 1979).

[34] The situation at issue in *Glomac Plastics* fell somewhere between *Weingarten* and the circumstances of the present case. In *Glomac Plastics*, the employer refused an employee's request to have present at an investigatory interview a union negotiating committee member and disciplined the employee for refusing to take part in the interview without this representative. Id. at 1309. The situation was different from that of *Weingarten*, and yet was not the equivalent of the situation in *Materials Research* and the present case, because there was merely some controversy as to whether the workplace employees were in fact represented by a union. As the *Glomac Plastics* Board explained, the employer had refused to bargain in good faith with the union and had thereby deprived its employees of the benefits of union representation. Id. at 1310. Thus, although the employees in *Glomac Plastics* were not unrepresented to the extent of those in *Materials Research* or the present case, they were not enjoying the full benefits of the representative that they had chosen. Because of this circumstance, the *Glomac Plastics* Board did employ certain language in its decision that apparently relates to the situation of nonunionized employees; the *Materials Research* majority, thus, drew on this language in making its argument that nonunionized employees should enjoy a right equivalent to the *Weingarten* right of unionized employees.

[35] Id. (quoting *Glomac Plastics,* 234 NLRB at 1311).

[36] Id. (citing *Glomac Plastics*, 234 NLRB at 1311, and quoting *Weingarten*, 420 U.S. at 270, fn.1 (Powell, J., dissenting)).

[37] *Id.* at 1014.

[38] *Weingarten*, 420 U.S. at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)), quoted in *Materials Research*, 262 NLRB at 1014.

[39] *Materials Research*, 262 NLRB at 1014 (citing *Glomac Plastics*, 234 NLRB at 1311). For an explanation of how Chairman Van de Water, in dissent, refuted the majority's use of this Supreme Court language, see infra note 45.

[40] Id.

[41] Id.

[42] Id. at 1016 (citing *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); and *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944)).

[43] Id. at 1016–1017. As Chairman Van de Water explained, once unit employees have designated a bargaining representative and that representative has been recognized or certified, the employer is obligated under Sec. 9(a) to deal with the union as its employees' exclusive representative. Id. Under Sec. 8(d), the employer must "confer [with the union] in good faith with respect to wages, hours, and other terms and conditions of employment." Id. at 1017 (quoting 29 U.S.C. Sec. 158(d)). Additionally, it is an unfair labor practice under Sec. 8(a)(5) for the employer to refuse to deal with the union about these Sec. 8(d) matters. Id. In fact, once such an exclusive representative has been recognized or certified, the employer cannot deal individually with its employees but must instead, under Secs. 8(a)(5), 8(d), and 9(a), deal with them collectively through their union with regard to their terms and conditions of employment. Id.

[44] Id.

tered on the existence of a collective-bargaining relationship.[45]

Chairman Van de Water went on to explain the repercussions that would result from finding a right to representation by a coworker at an investigatory interview. As Chairman Van de Water noted, the Supreme Court had described the role of a union representative in such a situation as someone who could "make proposals and suggestions to the employer concerning such things as alternative discipline and other possible avenues of investigation," and the Board had previously found that employers had to allow such representatives "to play an active role in the discussions."[46] According to the Chairman, this prescribed role of a *Weingarten* representative "is strikingly similar to the role of a labor organization in its dealings with an employer."[47] Chairman Van de Water felt that, by extending this role to a nonunionized employee's coworker, the *Materials Research* majority had succeeded in creating a hybrid relationship whose existence is justified solely by Section 7's call for employee mutual aid and protection. It is a relationship of potential cost and limitations for the employer which exists without reference to other applicable provisions of the Act; one that exercises its powers without being subjected, in any way, to the responsibilities imposed on other entities that exercise such powers; and it is a relationship to which the employer must render deference without being provided the normal safeguards which would otherwise be available.[48]

Chairman Van de Water next discussed how the *Materials Research* majority's application of the *Weingarten* right to a nonunionized setting altered the employer-employee relationship with regard to a single aspect of terms and conditions of employment, thereby requiring employers to deal differently with employees for purposes of investigatory interviews as compared to all other terms and conditions. In this regard, the Chairman explained that such things as discussions about changes in pay scales, safety matters, and hours of work all would relate to an employee's terms and conditions and could have an even greater negative impact on an individual employee than could some forms of discipline. Yet, as the Chairman explained, the *Materials Research* majority certainly would not require an employer, who wished to speak with an individual employee about such a matter, to allow that employee's request to have a coworker present or forego the discussion altogether.[49]

Finally, Chairman Van de Water went on to explain why Section 7's "mutual aid or protection" language by no means compels the *Material Research* majority's result. Employees' Section 7 rights are affected by whether or not they have selected an exclusive representative. For example, when employees have selected a representative, they are no longer free to deal with their employer on an individual basis, and the union is free to waive some employee rights.[50] On the other hand, once they have opted for a union's representation, employees gain the right to bargain collectively with their employer and to insist that any agreement that is reached be put in writing and signed.[51] Thus, endowing only represented employees with the *Weingarten* right to representation under Section 7 would

[45] Id. at 1018 (quoting *Weingarten*, 420 U.S. at 261–262). At this point in his dissent, Chairman Van de Water also criticized the majority's attempt to equate the situations of represented and unrepresented employees by asserting that concerns expressed by the *Weingarten* Court with regard to represented employees applied equally or with even more force to unrepresented employees. As explained supra, the *Materials Research* majority quoted language from *Weingarten* expressing the Supreme Court's concern that denying represented employees a right to have union representation at investigatory interviews would "perpetuate[ ] the inequality the Act was designed to eliminate" and would "bar[ ] recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Weingarten*, 420 U.S. at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)), quoted in *Materials Research*, 262 NLRB at 1014. As explained, the *Materials Research* majority insisted that these same concerns supported extending the *Weingarten* right to unrepresented employees. 262 NLRB at 1014. Chairman Van de Water, however, explained that the purpose of the Act was not to improve employees' positions through any means possible but instead was to give employees the ability to improve their own positions through the selection of a collective-bargaining representative:

> My colleagues rely on this language from the *Weingarten* decision, asserting that the presence of a fellow employee at an investigatory interview serves to enhance employees' economic power *vis-à-vis* their employer. While they may be correct that their decision does improve the employees' position in the balance of power, the simple fact remains that Congress has declared that the means by which employees are to redress such economic imbalance is utilization of the Act's processes for majority selection of an exclusive collective-bargaining representative. No doubt, this Board could construct a myriad of rules which would enhance the position of employees. To do so, however, it would have to ignore the mandate of Congress as well as the Supreme Court's admonition that "the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power."

Id. at 1018 fn. 37 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. at 310.

[46] Id. at 1019 (citing *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980)).

[47] Id.

[48] Id.

[49] Id.

[50] Id. at 1020. In support of his assertion that the scope of Sec. 7 rights is affected by whether employees are represented, specifically in that unions may permissibly waive certain Sec. 7 rights, Chairman Van de Water pointed explicitly to the fact that when a union becomes the exclusive representative of a unit of employees, it is permitted to waive those employees' right to strike. Id. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983) ("This Court long had recognized that a union may waive a member's statutorily protected rights, including 'his right to strike during the contract term, and his right to refuse to cross a picket line.") (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)); and *Plumbers & Pipefitters Local 520 v. NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992) ("[M]any of the rights guaranteed to employees by the NLRA may be altered or waived by a union in collective bargaining, so long as the union fulfills its duty of fair representation and takes no action that would impair the employees' choice of their bargaining representative.") (citing *Metropolitan Edison*, 460 U.S. at 705–707).

[51] Id.

not be anathema to other applications of Section 7. Furthermore, as Chairman Van de Water explained, the mere fact that employee conduct is an attempt to obtain mutual aid or protection does not mean that an employer must accede to the request.[52] To prove his point, the Chairman considered application of the *Materials Research* majority's reasoning in a situation other than the *Weingarten* scenario. As he explained, employees in a nonunionized workplace could come together and agree to ask the employer to submit workplace changes to an employee majority vote.[53] This conduct would clearly be in pursuit of mutual aid or protection against the possibility of "arbitrary or onerous employer actions," and an employer would not be able to discipline the employees for merely making the *request*.[54] However, the employer would not violate the Act by refusing the request and proceeding with the implementation of workplace changes in its usual manner.[55] Chairman Van de Water then explained that the *Weingarten* situation in a nonunionized workplace should be treated in the same way, i.e., "employees who request the presence of a fellow employee at an investigatory interview are seeking mutual aid and protection and an employer would violate the Act by punishing an employee for *seeking* that protection."[56] However, according to Chairman Van de Water, nothing
in the Act would require the employer to accommodate the employee's request or forego the interview.[57]

As previously noted, Member Hunter also dissented from the *Materials Research* majority's determination that unrepresented employees enjoy a *Weingarten* right to representation. Member Hunter first noted, along the same lines as Chairman Van de Water, that the *Weingarten* decision itself was grounded in the collective-bargaining relationship and in the Court's concern for the bargaining representative's right to protect not only the interests of the individual employee but the interests of the entire unit, a concern not present in the nonunionized setting.[58] Member Hunter next turned to the "practical reasons" for refusing to extend *Weingarten* to the nonunionized setting. Member Hunter explained that, while the Supreme Court in *Weingarten* had focused on "the important role a knowledgeable union representative could play in assisting the employer by eliciting favorable facts and the like," the same could not be said in the nonunionized setting. Instead,

> the employer in the nonunion situation is likely to find itself confronted by a "representative" who has few or even an absence of the skills or responsibilities that one would expect from a union steward. It must therefore deal with a person who has no experience in dealing with these situations and who, out of probable friendship for the interviewee, may be involved emotionally in the interview.[59]

Despite these two vigorous dissents, the *Materials Research* majority won the day and established a right in unrepresented employees to representation by a coworker at investigatory interviews. As explained below, however, the right was not long-lived.

b. Limiting the Weingarten Right

Just 3 years after its decision in *Materials Research*, the Board overruled that case and found that unrepresented employees do not enjoy a *Weingarten* right to representation. In *Sears, Roebuck & Co.*,[60] the Board "fully endorse[d] former Chairman Van de Water's dissenting opinion" in *Materials Research*.[61] The *Sears* Board explained that the *Weingarten* right is clearly appropriate in a unionized setting because, in such a workplace, the union has been "vested with the exclusive authority to represent unit employees and deal with the employer on *all* matters involving terms and conditions of employment, including . . . *discipline*."[62] Thus, when a unionized employer seeks to do something that will affect an employee's terms or conditions, it is not free to deal individually with the employee when that employee objects.[63] The situation is different, however, when the workforce is not unionized; in such a situation, "an employer is entirely free to deal with its employees on an individual, group, or wholesale basis" with regard to all terms and conditions, including discipline.[64] According to the *Sears* Board, the *Materials Research* decision required nonunionized employers to deal collectively with their employees, a result that "fundamentally alters our statutory scheme" and "wreaks havoc with fundamental provisions of the Act."[65]

The *Sears* Board then went on to reject the reasoning employed in *Materials Research*. In *Sears*, the Board explained that reliance on *Weingarten*'s basis in Section 7 was misplaced because "[t]he scope of Section 7's protections may vary depending on whether employees are represented or unrepresented."[66] Additionally, the *Sears*

[52] Id. (citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) for the proposition that "not all concerted actions for mutual aid and protection are protected by our Act").
[53] Id.
[54] Id.
[55] Id.
[56] Id. (emphasis in original).
[57] Id. at 1020–1021.
[58] Id. at 1021.
[59] Id. at 1021.
[60] 274 NLRB 230 (1985).
[61] Id.
[62] Id. at 230–231 (emphasis in original).
[63] Id. at 231.
[64] Id. (citing *Linden Lumber v. NLRB*, 419 U.S. 301 (1974); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944); and *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937)).
[65] Id.
[66] Id. Here, the *Sears* Board, like Chairman Van de Water in his *Materials Research* dissent, relied on *Emporium Capwell* in which unionized employees picketed in an attempt to force their employer to deal with them rather than their union. Id. (citing *Emporium Capwell*, 420 U.S. 50 (1974)). The Supreme Court held that the discharges that resulted were lawful because "the employees' actions contravened the

Board rejected the *Materials Research* Board's reliance on the fact that a *Weingarten* representative "is not cloaked with full collective-bargaining authority."[67] Although the *Sears* Board acknowledged that this was an accurate statement of the limitation placed on a *Weingarten* representative, it explained that "the representative *acts as a representative for the employee being interviewed and all other employees in the unit*."[68] This fact, in addition to the Board's previous holding that *Weingarten* representatives must be allowed to speak and be free to make proposals or offer alternatives, constituted "'dealing with' the employer, and 'dealing with' an employer is a primary indicium of labor organization status as well as a traditional union function."[69] It would run "contrary to the Act's exclusivity principle" to force a nonunionized employer "to recognize and deal with the equivalent of a union representative."[70]

Member Hunter filed a separate concurring opinion in *Sears* because he felt that the Act does not *compel* the *Sears* decision; rather, according to Member Hunter, extending *Weingarten* rights to nonunionized employees would be "a permissible but not a reasonable construction of the Act."[71] Member Hunter then went on to explain why, in his opinion, overturning *Materials Research* was the most reasonable approach. First, he pointed out that *Materials Research*, by equating the Section 7 rights of unionized and nonunionized employees, gave "representation to employees who have not chosen to be represented," despite the fact that employees' Section 7 rights can vary depending on whether they are represented by an exclusive bargaining agent.[72] Member Hunter went on to decry the *Materials Research* majority's "denigration" of "the knowledge, skill, and experience which the union representative typically brings to the investigatory interview" as well as its failure to take notice of the fact that a union representative is "charged with the concerns of the unit as a whole."[73] Member Hunter then went into some detail about how these differences in the unionized and nonunionized settings could affect the efficacy and role of a *Weingarten* representative:

> In the represented setting, the employer regularly deals with the union representative on matters besides the investigatory interview. There is more likelihood that the employer then will permit greater participation from the union representative at the investigatory interview because the employer knows that he may face the union representative again on this matter in a postdiscipline grievance or on other related matters. In addition, with the union representative, there is more impetus on the employer to make consistent disciplinary decisions because the union representative manifests an apparent solidarity of the employees in the unit. The presence of the union representative also has a beneficial effect for employers in that his presence may discourage frivolous grievances and reduce the costs of nonfrivolous grievances. . . . [I]n the unrepresented setting, there is an unlimited pool of potential witnesses at these interviews since the employee can choose any coworker he likes. This unlimited pool can hinder continuity and speedy investigations which the employer seeks.[74]

Because of these differences in the two settings, Member Hunter concurred in the *Sears* majority's decision to overturn *Materials Research*, despite his understanding that neither result was compelled by the Act or by *Weingarten*.

Three years after *Sears* was decided, Member Hunter's approach basically became the majority approach to the *Weingarten* question in the nonunionized setting. In *E. I. DuPont & Co.*,[75] the Board reconsidered *Sears* after a re-

exclusivity provisions of Section 9." Id. The employees' actions, which were concerted, would have been protected under Sec. 7 if they had not been represented by a union, but "their rights in a unionized setting could not 'be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.'" Id. (quoting *Emporium Capwell*, 420 U.S. at 69). According to the *Sears* Board, the same reasoning is applicable to the *Weingarten* question in a nonunionized setting: "The scope of Section 7's protections may vary depending on whether employees are represented or unrepresented, and the Section 7 rights of one group cannot be mechanically transplanted to the other group at the expense of important statutory policies." Id.

[67] Id.

[68] *Id.* (emphasis in original).

[69] Id. at 232 (citing *Materials Research*, 262 NLRB at 1016 fn. 30, 1019 fn. 40, and accompanying text (Chairman Van de Water, dissenting)). The Board has more recently reaffirmed the notion that "dealing with" is one of the primary factors indicative of labor-organization status. See *Polaroid Corp.*, 329 NLRB 424 (1999); and *Electromation, Inc.*, 309 NLRB 990, 994–995 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). Forcing an employer to meet with an employee representative as well as the employee whose behavior is at issue and endowing that representative with the right to speak and make proposals treads very close to the line of forcing an employer to deal with a "labor organization" that has not been certified or recognized as the exclusive representative of the unit employees. See *Polaroid*, 329 NLRB No. 47 slip op. at 2 ("The Board has explained that 'dealing with' contemplated 'a bilateral mechanism involving proposals from the employee committee . . . , coupled with real or apparent consideration of those proposals by management.'") (quoting *Electromation*, 309 NLRB at 995 fn. 21).

[70] Id.

[71] Id.

[72] Id. at 233–234.

[73] Id. at 234.

[74] Id.

[75] 289 NLRB 627 (1988), review denied sub nom. *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989). The procedural history of this case is somewhat complicated. Initially, the Board affirmed the judge's determination that the employer had violated the Act by discharging an employee for refusing to take part in an investigatory interview without a coworker present. 262 NLRB 1028 (1982). The Third Circuit enforced the Board's decision. 724 F.2d 1061 (3d Cir. 1983). The Respondent then filed motions for panel rehearing and rehearing en banc, and the Board requested that the court vacate its decision and remand to the Board for further consideration. The court then granted panel rehearing, vacated its opinion, 724 F.2d 1061 (3d Cir. 1984), and remanded to the Board, 733 F.2d 296 (3d Cir. 1984). The Board proceeded to issue a supplemental decision in which it reversed the judge and found, based on *Sears*, that the employer had not violated the Act. 274 NLRB 1104 (1985). Finally, the Third Circuit remanded the case

mand from the Third Circuit in which the court held that "the Board erroneously assumed that the Act mandated its interpretation" and directed the Board to consider whether "it would be a *permissible* interpretation of the Act to conclude that unrepresented employees are not entitled to the presence of a coemployee during an investigatory interview."[76] In *DuPont*, the Board proceeded to overrule that part of *Sears* that held that the Act compelled the finding that unrepresented employees do not enjoy a *Weingarten* right to representation by a coworker at an investigatory interview.[77] Rather, the *DuPont* Board held that, although the *Materials Research* decision might have been a permissible interpretation of the Act,[78] the proper balance between labor and management's conflicting interests is "better served" by not extending the *Weingarten* right to the nonunionized workplace.[79]

The Board considered the factors that supported the different balance struck in *Weingarten* itself and how these factors fared in the nonunionized workplace. While the *Weingarten* Court had emphasized the fact that a union representative could safeguard the interests of the entire bargaining unit in addition to those of the individual employee, the Board explained that there is no such guarantee in the nonunionized workplace.[80] Similarly, a coworker would be less likely than a union representative to be able to keep an employer from engaging in unjust conduct, because there would not be a collective-bargaining agreement to define misconduct and how to ameliorate it and because the coworker probably would not have access to information about how other employees had been treated under similar circumstances.[81] The *DuPont* Board then went on to explain that a *Weingarten* representative in a nonunionized setting would also be less helpful to an employer than would a union representative. While a union representative may assist the employer by helping to elicit facts and to speed things along, such assistance from a fellow employee would be less likely, because such a fellow employee would probably have no experience with such interviews and might be emotionally involved in the outcome due to his or her relationship with the interviewee.[82] Similarly, the likelihood of "heading off formal grievances," a factor weighing in favor of the presence of a union representative, would not come into play in a nonunionized workplace where no collective-bargaining agreement would provide for formal grievance procedures.[83]

The *DuPont* Board then proceeded to consider the situation that would arise if an employer decided, as is its prerogative under *Weingarten*, that, rather than have a representative present, it would prefer to forego the interview altogether. In a unionized workplace, although the employee would lose the opportunity to explain the incident at issue, if discipline resulted, the employee would still be able to avail himself or herself of whatever grievance procedures had been provided through the collective-bargaining process.[84] An employee in a nonunionized workplace, however, would have no such safeguard. Thus, as the Board explained:

> To the extent that recognition of a nonunion *Weingarten* right induces employees to insist on a condition that may in turn induce employers simply to cancel investigatory interviews (unless the employee waives his *Weingarten* right), there is a serious question whether extending the right to nonunion employees may not work as much to their disadvantage as to their advantage.[85]

In light of all of these factors, the *DuPont* Board determined that it would "best effectuate the purposes of the Act" by endowing only unionized employees with the right to a *Weingarten* representative on request.[86] The Board did note that it was not implying that a nonunion employee does not have a right to make a *request* for representation at an investigatory interview.[87]

3. Should *Weingarten* now be re-extended?

With this background, the issue of *Weingarten* representation in nonunionized workplaces has arisen again, and today, my colleagues in the majority decided once again to move away from *Sears* and *DuPont* and back to *Materials Research* and find that the Respondent in this case has violated Section 8(a)(1) by discharging Borgs for refusing to meet with Loehrke and Berger in the absence of his coworker Hasan. I, however, would find that the Respondent has not violated the Act, because nonunionized employees do not enjoy a *Weingarten* right to representation by a coworker. Furthermore, I would return to *Sears* and find that this conclusion is compelled by the Act.

As explained in detail above and in both Chairman Van de Water's dissenting opinion in *Materials Research*[88] and the *Sears* opinion,[89] a nonunionized employer is under no duty to recognize an employee representative until it has achieved recognitional status satisfactory to the employer or has been certified by the Board.[90] Prior to this recogni-

because it determined that the Board should not have assumed that the Act mandated the *Sears* interpretation. 794 F.2d 120 (3d Cir. 1986).

[76] 289 NLRB at 627 (emphasis added).

[77] Id. at 628.

[78] Id.

[79] Id. at 630.

[80] Id. at 629.

[81] Id.

[82] Id. at 629–630 (quoting *Materials Research*, 262 NLRB at 1021 (Member Hunter, dissenting)).

[83] Id. at 630.

[84] Id.

[85] Id.

[86] Id. at 631.

[87] Id. at 630 fn. 15.

[88] 262 NLRB at 1016–1019.

[89] 274 NLRB at 230–231.

[90] Once a majority of employees in an appropriate unit has properly selected a representative, an employer becomes obligated to bargain with that representative instead of with individual employees. For example, Sec. 9(a) of the Act provides:

tion or certification, a nonunionized employer may deal on an individual basis with its employees with regard to all terms and conditions of employment. By finding that nonunionized employees have a *Weingarten* right to representation during investigatory interviews, my colleagues carve out an area in which they force nonunionized employers to deal collectively with employees, a result that is completely at odds with the intent and structure of the Act.

My colleagues' reliance on the applicability of Section 7 rights to nonunionized as well as unionized employees is misplaced. As explained above, the scope of Section 7 rights can and does vary depending on whether employees have a recognized or certified exclusive bargaining representative. Here, nonunionized employees would clearly have the right to *request* that a coworker attend an investigatory interview,[91] but their employers just as clearly are permitted to deny that request. Any other result creates a situation in which nonunionized employers, who have no duty to bargain or deal with an employee representative with regard to any other terms and conditions of employment, are burdened with this duty in one particular situation, that of investigatory interviews that may result in discipline.[92] My colleagues offer no explanation as to why this one situation should be treated any differently from a myriad of other situations in which an individual nonunionized employee may request the presence of a coworker at a meeting with the employer that is related to any term or condition of employment. Do nonunionized employees then have a right to insist on such representation when their employer wishes to discuss compensation or work hours with them individually? To so hold would obviously alter the structure of our Act and our long-standing interpretation of it.[93] It makes no more sense to carve out this term or condition of employment and endow nonunionized employees with a right to representation in the particularized situation of investigatory interviews.[94]

Although I think that it is clear that the Act compels a finding that nonunionized employees are not entitled to a *Weingarten* right, I think that it is equally clear that, even

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives of all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. Sec. 159(a) (emphasis added).

Additionally, Sec. 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." 29 U.S.C. Sec. 158(a)(5).

[91] As explained above, Chairman Van de Water also alluded to an employee's right to *request* representation. He noted that employees can engage in conduct that is an attempt to obtain mutual aid or protection, such as requesting a *Weingarten* representative, and that employers cannot discipline them for making such a request. *Materials Research*, 262 NLRB at 1020. He went on, however, to explain that the mere fact that an employee attempts to obtain mutual aid or protection does not mean that an employer is required to accede to the employee's request. Id. See also supra text accompanying notes 52–55.

[92] Although my colleagues characterize my argument as stating that extending the *Weingarten* right to the instant situation forces an employer to deal with the equivalent of a labor organization, I do not find that coworker-representatives are *necessarily* the equivalent of a labor organization. What my colleagues decide in this case, however, treads very close to the line of forcing employers to "deal with" the equivalent of a "labor organization" that has not been certified or recognized, as explained supra note 69. My colleagues' decision places this burden on nonunionized employers in one particularized situation and no other. It is no answer to argue, as my colleagues do, "that an employer is completely free to forego the investigatory interview," and thus, has no obligation to deal with the employee's coworker-representative. The fact of the matter is that if the employer wants to get to the bottom of a situation with an employee by questioning that employee, something that it would be perfectly free to do with regard to any other term or condition of employment, it *does* have an obligation to deal with that employee's coworker-representative. In this regard, the nonunionized employer has entirely the same obligation as a unionized employer, even though its employees have not chosen to be represented by a collective-bargaining representative.

[93] My colleagues, like the *Materials Research* majority, assert that unrepresented employees *need* the assistance and support of a fellow employee in the investigatory-interview situation. This assertion, however, is driven neither by the statute nor by its legislative history. My colleagues are treating a presumed need as a statutory mandate. Our job, however, is to administer the Act that Congress passed, and nothing in that statute nor the legislative history justifies creating this one exception to our usual treatment of unorganized employees in the exercise of their Sec. 7 rights. My colleagues' approach treats the Act as infinitely elastic without any statutory authorization.

[94] In response to the question why nonunionized employees should be entitled to a coworker-representative at investigatory interviews but not at other meetings with their employers, my colleagues state that the principles put forward by the Supreme Court in *Weingarten* "speak only to this specific right" and that, therefore, other circumstances are not "encompassed within the *Weingarten* rationale" and are not before the Board today. This argument does not even begin to answer the question posed, however. Of course these other nonunionized-workplace situations are not "encompassed within the *Weingarten* rationale"; *Weingarten*'s rationale relates exclusively to *union* representation at investigatory interviews—unionized employees clearly already have a right to be represented with regard to changes in other terms and conditions of employment.

Additionally, although these other situations involving meetings between nonunionized employers and employees are not explicitly raised in this particular case, to the extent that these other situations demonstrate the difficulties with extending the *Weingarten* right to the nonunionized setting, they are before the Board today. My colleagues avoid the issue because there is *no* logical reason for extending nonunionized employees a representational right in the investigatory-interview situation and no other. However, if my colleagues were to acknowledge this fact, they would have to find that nonunionized employees have a right to at least this limited *Weingarten*-type representation at *any* meeting with an employer in which terms and conditions of employment may be affected, despite the fact that they are not represented by a certified or recognized union. In fact, logically extended, my colleagues' reasoning would result in a greatly reduced need for employees to avail themselves of the Act's processes relating to certification of a bargaining representative, because they would already have the right to at least limited representation in virtually every situation in which terms and conditions of employment may be affected.

if this result were not compelled, it is the better approach because it more properly balances the interests of labor and management. First, as Member Hunter noted in his dissenting opinion in *Materials Research*[95] and as explained by the Board in *DuPont*,[96] a coworker-representative does not bring the same level of assistance to an investigatory interview as does a union representative. As explained above, a union representative serves the interests of both employee and employer at an investigatory interview by eliciting facts and helping to avoid the filing of frivolous grievances. A coworker representative, however, is less likely to have experience with such interviews and, as Member Hunter has noted, may be emotionally involved.[97] My colleagues in the majority respond to these concerns by asserting that they are "wholly speculative." It seems more speculative, however, to assume that a lone individual, selected on the spur of the moment, will advance the interests of the unit. By contrast, an experienced union representative who is familiar with the lore of the shop floor and who regularly deals with the employer in a variety of matters, including the processing of grievances, is likely to be of more assistance to both employer and employee at a *Weingarten* interview than is a coworker who may never have even attended such an interview or had any dealings with the employer beyond that of an employee. In fact, in the nonunionized setting, an employee is apparently free to choose any coworker as a representative, including someone who is personally involved in the matter under investigation, a result that certainly could lead to "representatives" who are not only hostile to the employer but extremely unlikely to be of any assistance to the employer in objectively getting to the bottom of the incident at issue.[98]

Another practical reason for refusing to extend the *Weingarten* right to the nonunionized setting relates to a separate point raised by the Supreme Court in *Weingarten*. As explained previously, the Court emphasized the fact that having a union representative present during an investigatory interview could help to safeguard the interests of the bargaining unit generally. There is no similar guarantee in the nonunionized workplace. A coworker, chosen as a representative by an employee for his or her own personal reasons, may or may not have the interests of the rest of the workforce in mind. A coworker-representative certainly would not have the same kinds of incentives to look out for these wider interests that a union representative would. My colleagues in the majority again dismiss this concern as "wholly speculative." However, the fact that a given coworker-representative might act in the interests of the workforce as a whole does not overcome the very real concern that the likelihood of safeguarding the interests of an entire unit of employees is much more likely to occur in the unionized setting than the nonunionized setting.[99]

Because the factors that weighed in favor of *Weingarten* representation in the unionized setting are absent or at least drastically reduced in importance in the nonunionized setting, I would find that a proper balance of labor and management interests should not result in imposing the burden of *Weingarten* representation on employers in the nonunionized setting. Nonunionized employers should not be burdened with a duty either to accede to an employee's request for a coworker-representative or to forego an investigatory interview when neither the employee nor the employer is significantly assisted by the presence of such a representative. Moreover, as explained above, I would find that the NLRA itself forbids this result, a result that places a duty to recognize a representative in a specific, limited, and apparently arbitrary situation on an employer that is otherwise free to deal with employees individually. Because the result reached by the majority in this case runs

[95] 262 NLRB at 1021.

[96] 289 NLRB at 628–630.

[97] 262 NLRB at 1021.

[98] It should be noted here that the present case is just such a situation. The person whom Borgs requested as his coworker-representative was Hasan, Borgs' partner in writing the January 17 memo about which Loehrke and Berger wished to meet with Borgs. Thus, Hasan would have been unlikely to be of assistance to the employer in any way at Borgs' interview as he had a direct interest in defending *himself* as well as Borgs.

[99] As explained, my colleagues assert that all of these concerns regarding a coworker-representative's inability to provide the same types of assistance as a union representative are mere speculation. They focus specifically on my concern that a coworker-representative will be of less assistance to the employer, but as I have explained, it is at least as likely that a coworker-representative will be less helpful to employees. One of the reasons that the *Weingarten* Court held that an employee's ability to have a union representative present at investigatory interviews was protected even though the employee at issue would be seeking aid or protection against *individual* discipline was that a *union* representative safeguards the interests of the entire bargaining unit. A union representative performs this function by making certain that the employer does not engage in a practice of imposing discipline unjustly and by his or her very presence at the interview, which assures other unit employees that he or she will provide the same aid or protection to them if it should become necessary. *Weingarten*, 420 U.S. at 260–261. There just is not the same type of assurance with a nonunion coworker-representative. To understand this fact, one must only consider the present case. Here, Hasan, the potential coworker-representative, took part with Borgs in the very activity under investigation. He thus had a vested interest and would have wanted to protect his own interests as well as Borgs'. It is unlikely that he would have been concerned with the possibility that the employer would apply similar discipline in some future situation, and it is even more unlikely that his presence at the interview, as Borgs's friend and compatriot in the behavior under investigation, would have sent a message to other employees that he would be there for them if the need arose.

It is also important to point out here that my colleagues' discounting of these factors under the guise of speculation, relating to the benefits of union representatives at investigatory interviews, flies in the face of *Weingarten* itself. In that case, the Supreme Court emphasized the importance of these very benefits. They were an important part of the factors that went into balancing the conflicting interests of labor and management, a balancing that in *Weingarten* supported the finding that unionized employees are entitled to the presence of a union representative at investigatory interviews. Here, these same factors weigh against finding a similar right in nonunionized employees.

counter to the Act and does not properly balance the interests of labor and management, I must dissent.

B. Hasan's Discharge

As explained above, the Respondent issued a written warning to Hasan for his part in the January 17 memo, which had stated that Berger's supervision of the project was no longer necessary. The warning explained that Hasan would be terminated if he engaged in any further misconduct or insubordination. Thereafter, the Respondent terminated Hasan and later provided him with a letter stating that he had been terminated because of his conduct over the previous 9 months, specifically his refusal to accept supervision and his confrontations with staff members. The judge determined that the Respondent did not violate the Act when it warned and then discharged Hasan, because the January 17 memo was not protected activity. Nonetheless, my colleagues in the majority have decided that the Respondent did in fact violate Section 8(a)(1) based on their finding that the January 17 memo was in fact protected, concerted activity that was "inextricably intertwined" with the January 29 memo. According to my colleagues, the Respondent was motivated in its discharge of Hasan by its animus toward his protected activity relating to the memos and his earlier concerted conduct with Borgs. I, however, would adopt the judge's finding that the January 17 memo was not concerted, protected activity and that, therefore, the Respondent did not violate the Act when it discharged Hasan.

My colleagues in the majority find that, even if the sole purpose of the January 17 memo was to remove Berger as supervisor of the project, Hasan's conduct in preparing and submitting the memo was protected because Berger's conduct as a supervisor affected Hasan's working conditions. Additionally, they find that this January 17 memo was "inextricably intertwined" with the January 29 memo, which laid out Hasan's and Borgs's perceived problems with Berger's supervision. In this regard, my colleagues state that, because Loehrke and Berger had read both of the memos prior to their meeting with Hasan and their attempted meeting with Borgs on February 1, they "fully understood that the issues raised in the January 17 memo were not separate from the concerns about how they were being treated by their supervisor as set forth in the subsequent memo." Based on this finding, which is in direct contrast to the judge's finding that the second memo was a mere "after-the-fact attempt at damage control," my colleagues determine that the January 17 memo was a clear attempt to raise issues related to Hasan's and Borgs's employment conditions and that therefore the reprimand that Hasan received for his part in writing and submitting the memo violated Section 8(a)(1). Additionally, according to my colleagues, Hasan's discharge was violative of Section 8(a)(1) because the Respondent put Hasan "on the verge of termination" for taking part in the memo-writing, activity that my colleagues find to be protected, and then cited his conduct over the last 9 months, during which time Hasan did engage in some protected, concerted activity, in its termination letter. My colleagues assert that these two things demonstrate that the Respondent's animus toward Hasan's protected activity was the motivating factor behind his discharge.

Clearing away the smoke, the issues surrounding Hasan's discharge are determined by whether his conduct relating to the January 17 memo was protected.[100] The judge found that it was not, and my colleagues reject that determination. Under established law, employees are free to engage in concerted activities for mutual aid or protection in the absence of a union or collective-bargaining activity; however, concerted activity with the limited purpose of protesting the hiring, discharge, or continued employment of a supervisor[101] or of "affect[ing] the ultimate direction and managerial polices of the business" is not protected.[102] There is, of course, an exception to this rule, and it is that exception that my colleagues in the majority use to find that the January 17 memo was, in fact, protected activity. This exception applies to concerted activity that protests the selection or termination of a supervisor who directly impacts on the employees' working conditions.[103] My colleagues in the majority find that "Berger's supervisory duties had a significant impact on Hasan's terms [and] conditions of employment" and that, therefore, Hasan's part in the January 17 memo was protected activity.

I would find that Hasan's conduct with regard to the January 17 memo was not protected, because that memo explicitly called for Berger's removal as supervisor of the project and did not protest any actions that Berger had taken that affected Hasan's terms and conditions of employment. An examination of some of the cases that have found protected activity when employees have protested

[100] Hasan's conduct in this regard was clearly "concerted" as he and Borgs wrote and submitted the January 17 memo together.

[101] See, e.g., *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 262 (9th Cir. 1995); *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 463 (2d Cir. 1958); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949); and *Hoytuck Corp.*, 285 NLRB 904 fn. 3 (1987).

[102] *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980).

[103] See, e.g., *Atlantic-Pacific Construction*, 52 F.3d at 262 ("[W]here the purpose of the concerted activity is not related to working conditions, as where personal animus motivates employee protest over the selection of a manager, the protest is not protected.") (citations omitted); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990) ("In a narrow category of cases . . . concerted activity to protest the discharge of a supervisor or to effect the discharge or replacement of a supervisor may be 'protected,' provided the identity of the supervisor is directly related to terms and conditions of employment.") (citations omitted); *Caterpillar, Inc.*, 321 NLRB 1178, 1179–1180 (1996); *Hoytuck Corp.*, 285 NLRB at 904 fn. 3; *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984), enfd. mem. 767 F.2d 930 (8th Cir. 1985), supplemented by 277 NLRB 1321 (1985); and *Lutheran Social Service*, 250 NLRB at 41 ("[P]rotests against the appointment or termination of 'low-level' supervisors may be protected when directly related to the employees' conditions of employment.") (citations omitted).

the employment of a supervisor demonstrate that the present case does not meet this exception.

In *Dreis & Krump Mfg. Co. v. NLRB*,[104] for example, the union brought a formal grievance on behalf of an employee, charging a supervisor with "negligence in overseeing safety and production."[105] During the grievance process, the employee distributed copies of the grievance and a statement about the matter to fellow employees.[106] He was thereafter discharged.[107] The Board found that the employer had violated the Act, and the Seventh Circuit upheld that determination. In so doing, the court distinguished the situation in which an employee protest of a supervisor is based on animus toward that supervisor and therefore is not protected.[108] As the court explained, the employee in *Dreis & Krump*, through circulation of the grievance and statement, was warning fellow employees about "supervisory deficiencies which potentially affect on-the-job safety and performance" and was therefore furthering a purpose of mutual aid or protection.[109] Thus, in *Dreis & Krump*, the employee activity focused on specific problems with the supervisor and articulated those problems within the protest materials themselves.

Similarly, in *NLRB v. Oakes Machine Corp.*,[110] the Second Circuit upheld the Board's determination that employee protests of a supervisor were protected and that the discharges that resulted violated the Act. In that case, an employee sent a letter to his employer's parent company, complaining about the conduct of the employer's president and was terminated as a result.[111] The court first noted that "[e]mployee action seeking to influence the identity of management hierarchy is normally unprotected activity,"[112] but then went on to determine that, in the circumstances of that case, the letter-writing was protected. The letter contained several paragraphs complaining of the company president's "diversion of company resources and personnel away from potentially profitable company projects, in order to advance [his] own personal projects."[113] The court found a direct relation to terms and conditions of employment in this protest because "although the letter did not specifically state[ ] that [the president's] diversion of personnel and resources to personal projects had reduced employees' salaries, that inference was permissible, if indeed, not compelled."[114] This was so because it was known that employee raises and bonuses were tied to company profitability, that employees had not received an annual raise because the company had not been profitable, and that employees had blamed the time they were required to spend on the president's personal projects for the unprofitable year.[115] Thus, the letter to the parent company was clearly in protest of supervisor activities that affected employees' terms and conditions of employment.

Finally, *Caterpillar, Inc.*,[116] cited by my colleagues in the majority, provides yet another example of the required connection between the protest of a supervisor and the effect that that supervisor's activities have on employees' terms and conditions. There, the Board initially found that the employee protest was not actually an attempt to remove the chief executive officer,[117] but then went on to consider the effect that such a finding would have on its decision.[118] In *Caterpillar*, the employees had displayed the slogan "Permanently Replace Fites," Fites being the chief executive officer who had decided to replace permanently striking employees at other Caterpillar plants.[119] The Board found that the decision permanently to replace employees, conduct that was clearly referenced in the employees' chosen form of protest, "had an immediate and direct effect on the employees' 'lot as employees,'" thereby making their protest protected activity.[120] Again, however, *Caterpillar* involved activity on the part of employees that clearly referenced the actions by management that were under protest and that affected the employees' terms and conditions of employment.

In the instant case, the January 17 memo referenced no conduct by Berger. It merely stated that his supervision was no longer necessary.[121] There is absolutely nothing in the memo indicating that Hasan and Borgs were protesting any conduct on the part of Berger that had any effect on their working conditions. Thus, I would find that the January 17 memo was merely an attempt to remove Berger as their supervisor and was therefore unprotected by the Act.

My colleagues in the majority assert that the January 29 memo establishes that the January 17 memo was actually directed at supervisor conduct with a direct impact on

[104] 544 F.2d 320 (7th Cir. 1976).

[105] Id. at 323.

[106] Id. at 324. The attached statement read, "ATTENTION ALL WORKERS This case of J. Mayer [employee] v. J. Mirabella [supervisor] concerns ALL workers. We must not think that Mirabella is just peculiar. The Company knows what Mirabella does and supports him and all other foremen who act like him. WE DON'T HAVE TO TAKE IT!!!" Id.

[107] Id.

[108] Id. at 327–328 (explicitly distinguishing the situation at issue in *Joanna Cotton Mills v. NLRB*, 176 F.2d 749 (4th Cir. 1949), in which an employee was discharged for circulating a petition calling for a supervisor's termination after "the supervisor had disciplined the employee for operating gambling devices and being overly attentive to female employees during working hours").

[109] Id. at 328.

[110] 897 F.2d 84 (2d Cir. 1990).

[111] Id. at 86–87. Normally, employees "have no interest in the identity of high level management"; however, in this case, the company president could be considered much like a supervisor because he had "direct contact with employees, and his activities paralleled those of a low level supervisor at least to the extent that he made some job assignments." Id. at 90.

[112] Id. at 89.

[113] Id.

[114] Id.

[115] Id.

[116] 321 NLRB 1178 (1996).

[117] Id. at 1178.

[118] Id. at 1179.

[119] Id.

[120] Id. at 1180.

[121] For the full text of the January 17 memo, see supra note 7.

working conditions, even if the January 17 memo itself did not directly cite such conduct. In this regard, my colleagues are apparently at least impliedly rejecting the judge's finding that the January 29 memo was merely an attempt at after-the-fact damage control and not a sincere expression of concern about Berger's conduct as a supervisor. As I would accept the finding of the judge, who was able to observe the witnesses at the hearing and reach a conclusion based on all of the evidence and testimony, I disagree with my colleagues that the January 29 memo can somehow "save" the January 17 memo. As explained, the January 17 memo references absolutely no conduct on the part of Berger that would affect employee working conditions but rather merely calls for his removal as supervisor. The fact that Hasan and Borgs, after learning that Berger and Loehrke were angered by the January 17 memo, then drafted a second memo, in which they listed alleged problems with Berger's supervision, cannot mean that the initial memo is suddenly endowed with new meaning. Indeed, it is more a tacit recognition of the unprotected nature of the January 17 memo and an after-the-fact attempt to cover the clear omission from the January 17 memo.[122]

It is true that, in assessing whether employee protests of supervisors are aimed at conduct affecting terms and condition, the Board should consider all of the surrounding circumstances.[123] Here, however, the judge made a clear finding that the January 29 memo was a mere after-the-fact attempt to justify Borgs's and Hasan's earlier behavior. There is no other evidence that Borgs and Hasan had raised these concerns about Berger *prior to* the January 17 memo. The January 29 memo, coming as it did after the initial employee conduct and apparently in response to employer reaction to that conduct, cannot alone bring the January 17 memo into the realm of protected activity. Because the January 17 memo references absolutely no supervisor conduct having a direct impact on employee terms and conditions of employment and because there is no evidence of conduct on the part of Borgs and Hasan contemporaneous with that memo that would suggest that the memo itself was aimed at specific supervisor conduct with an impact on terms and conditions, I would find that it is unprotected as a mere attempt to remove a supervisor. Therefore, I would find that Hasan's discharge was lawful.

III.

In summary, I would find that the Respondent employer has not violated the Act as a result of its discharge of Borgs or Hasan. Under current law, a nonunionized employee has no right to a *Weingarten*-type representative at an investigatory interview with his or her employer. I believe that this approach is correct. My colleagues' decision to return to the *Materials Research* approach and endow unrepresented employees with such a right is contrary to the NLRA, which does not required nonunionized employers to "deal with" unrecognized and uncertified employee representatives. Additionally, even if this approach were cognizable under the Act, it does not result in a reasonable balance of the competing interests of labor and management. Whereas a union representative in an investigatory interview can be of assistance to the individual employee, the employer, and the unit as a whole, a coworker-representative is unlikely to be of much assistance to anyone, and thus burdening nonunionized employers with a requirement to allow such representation or forego investigatory interviews does not strike a fair balance. I therefore dissent from my colleagues' finding that the Respondent's discharge of Borgs violated the Act.

Similarly, I would find that the Respondent's discharge of Hasan was not in violation of the Act. His part in the January 17 memo was not protected activity because that memo did nothing more than call for the removal of a supervisor without citing a single incident of supervisory conduct that affected his terms or conditions of employment. Such activity is unprotected. The January 29 memo should not alter this finding as the judge specifically found that it was nothing more than an after-the-fact attempt at damage control. I therefore dissent from my colleagues' finding of a violation with regard to Hasan's discharge as well.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[122] My colleagues assert that, in accepting the judge's finding that the January 29 memo was merely an after-the-fact attempt at damage control, I contend, "at least implicitly[,] that the January 17 memo must have related to something other than supervisory conduct affecting employees." As explained, my contention is that the January 17 memo did nothing more than call for Berger's removal as supervisor without protesting any specific actions on Berger's part. As the cases discussed supra demonstrate, absent some indication that the call for removal of a supervisor is in response to some specific activity on the part of that supervisor that affected employees' terms and conditions of employment, the Board should not find that such an unexplained call for a change in management is protected activity.

My colleagues also aver that the fact that the Respondent did not take action against Hasan until after it received the January 29 memo "reasonably suggests that the Respondent understood that both memos related to supervisory conduct affecting the employees." To the extent that this speculation is even relevant, it should also be noted that Hasan and Borgs wrote the January 29 memo *after* learning that Berger and Loehrke were displeased with the January 17 memo and that the Respondent's disciplinary memos to Hasan and Borgs referenced the January 17 memo. These additional facts can just as "reasonably suggest" that the Respondent viewed the two memos as separate: the January 17 memo calling for the removal of a supervisor with no supporting reason and the January 29 memo merely attempting to divert the negative attention engendered by the January 17 memo.

[123] See, e.g., *Oakes Machine*, 897 F.2d at 89 ("Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of the circumstances.").

WE WILL NOT coercively interrogate you concerning your concerted protected activities.

WE WILL NOT issue disciplinary warnings to you for disclosing or discussing your wages with other employees.

WE WILL NOT threaten you with reprisals for disclosing or discussing your wages with other employees.

WE WILL NOT maintain a rule prohibiting you from disclosing or discussing your wages with other employees.

WE WILL NOT issue disciplinary warnings to you for engaging in protected concerted activities.

WE WILL NOT discharge you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our policy prohibiting you from discussing your wages with other employees.

WE WILL, within 14 days from the date of the Board's Order, offer Arnis Borgs and Ashraful Hasan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Arnis Borgs and Ashraful Hasan whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings and discharges of Arnis Borgs and Ashraful Hasan, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings and discharges will not be used against them in any way.

EPILEPSY FOUNDATION OF NORTHEAST OHIO

Paul C. Lund, Esq., for the General Counsel.

Steven Moss, Esq., and *Morlee A. Rothchild, Esq*., for the Respondent.

Cynthia Lowencamp, Esq., of Cleveland, Ohio, and *Neil Myers, Esq.,* of Euclid, Ohio, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On charges filed on April 10, 1996,[1] by Arnis Borgs and on May 13, 1996, by Ashraful Hasan, the Regional Director, Region 8, National Labor Relations Board, issued a consolidated complaint on November 14, 1996, alleging that Epilepsy Foundation of Northeast Ohio (the Respondent), had committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended. The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Cleveland, Ohio, on April 15 through 17, 1997, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent was a not-for-profit corporation engaged in the prevention and control of epilepsy at its facility located in Cleveland, Ohio. Annually, in the course and conduct of its business operations, the Respondent receives funds and contributions in excess of $500,000 of which over $50,000 is received directly from points located outside the State of Ohio. The Respondent has admitted the foregoing facts but in its answer and at the hearing denied that it is subject to the Board's jurisdiction because it is a nonprofit charitable social service organization. It did not discuss this issue in its brief and has offered no other reasons why it would not be subject to the Board's jurisdiction. The Board has long held that the only basis for declining jurisdiction over a charitable organization is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of its jurisdiction. *St. Aloysius Home*, 224 NLRB 1344, 1345 (1976). Here, the Respondent's annual revenues far exceed the discretionary jurisdictional standards applicable to health care institutions and social service organizations. See *Hispanic Federation for Social Development*, 284 NLRB 500 (1987). Moreover, as the Board has pointed out, employees of a nonprofit charitable organization have the same Section 7 rights to engage in protected concerted activities as do employees of commercial enterprises and are entitled to the remedial measures which may be required to remedy unlawful interference with such rights. *United Services for the Handicapped*, 251 NLRB 823, 825 (1980). Accordingly, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the jurisdiction of the Board.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent provides services to persons affected by epilepsy throughout Northeast Ohio. It is an affiliate of the Epilepsy Foundation of America (EFA) and participates in EFA sponsored programs. In 1993 the National Institute of Disability and Rehabilitation Research (NIDRR) awarded EFA a grant to conduct a research project involving school-to-work transition for teenagers with epilepsy. The Respondent submitted a proposal and was selected by EFA to conduct a 3-year demonstration project in which teenagers with epilepsy were recruited to participate in a vocational program, involving classroom and work experience with employers in the community, to prepare them for the transition from school to work. The Respondent was responsible for hiring, supervising and evaluating the staff needed to conduct the NIDRR project. The on-site immediate supervisor of the project, which commenced in October 1993, was Julie Johnson until she left in March 1994 and was replaced by the Respondent's director of vocational services, Rick Berger. Christine Loehrke, the Respondent's current executive director has had responsibility for overseeing the project from the outset. The project was also to be monitored by Jim Troxell, an EFA representative, and was to receive data processing and analytical services from Dr. Bob Fraser, a representative of the University of Washington. The

[1] Amended charges were filed by Borgs on June 21 and 27, 1996.

project included a full-time position for a transition specialist and Dr. Ashraful Hasan was hired by the Respondent to fill that position. Arnis Borgs was hired by the Respondent in June 1994 as a part time job coach and later became a full time employment specialist, a position that involved placing clients with epilepsy in jobs and assisting them in performing the jobs. In early 1995 he began working on the NIDRR project and his time was divided equally between his regular placement activities and duties related to the project.

B. Allegations Concerning Wage Information

The complaint alleges that on or about December 28, 1995, Arnis Borgs was unlawfully interrogated and threatened with unspecified reprisals for discussing employees' wages; that on that date the Respondent promulgated a rule unlawfully prohibiting employees from discussing wages; that, on January 3, 1996, he was given a written reprimand for obtaining and disclosing salary information; and that, on or about January 9 he was given another reprimand for insubordination because he had failed to return the warning notice he was previously given.

Borgs testified that in the late fall of 1995 he had discussions with other employees, including Tom Darkness and John Novak, concerning their wages. His annual evaluation was approaching and he asked other employees how much they were making and how raises were calculated. Some employees shared wage information with him and some did not. On December 28 he was called to a meeting with Berger and Loehrke. Just prior to that meeting, Berger told Borgs that Loehrke was "really angry" at Borgs because of his involvement in getting the employees' mileage reimbursement increased, discussed below, but also said that if Borgs repeated it to anyone he would deny having said so. At the meeting, Loehrke asked if Borgs had been discussing salaries with other employees, why he did so, and where he had gotten such information. Borgs responded that he was curious as to what other employees were making and that he had gotten the information directly from the employees. Loehrke told him that it was against the Respondent's policy to disclose salary information and Borgs said that he had not disclosed it but merely discussed it in casual conversations. Berger accused him of having a list of salaries that he was showing around, which Borgs denied. They continued to ask him why he wanted such information and where he had gotten it. Near the end of the meeting, Berger told him that he was being given "a warning" not to discuss salaries again. Loehrke said there was a policy against salary disclosure, that he should not be getting or disclosing such information, and that if he did it again he would be reprimanded. On January 3, 1996, Berger gave him a written warning notice for unauthorized access to and dissemination of confidential salary information. Berger told him he could sign or not sign the notice as he chose, but that it had to be resumed. Borgs took the notice and, when Berger asked about it, he said he wanted to discuss it with someone outside the agency and would return it on January 10. On that date, when Borgs resumed the first warning notice to Berger with his comments on it, he was given another warning notice. That notice reiterated that he was being warned for acquiring and sharing confidential salary information as well as for being "insubordinate" and having "confiscated" agency property by reason of his failure to return the first warning notice.

Christine Loehrke testified that salaries of the Respondent's staff are confidential and that only she, the Director of Administration Jim Wilson, and the bookkeeper have access to them. Payroll information is kept in a locked file cabinet to which only the same three people have access. She testified that the Respondent has an unwritten policy that unauthorized access to or dissemination of confidential information is unacceptable. In late November 1995 she was informed by Berger that Borgs had shared with employee Jeff Schoenberger a list of employee salaries and was provided with a memo dated November 28, 1995, from Schoenberger about the incident. Berger also told her about a conversation he allegedly had with Borgs and Hasan in which they indicated they had information concerning the salaries of several staff members, including Berger, Wilson, and Carol Doubler, a supervisor in the employment department. Berger asked how they acquired the information and they said that "they had their ways." After receiving this information from Berger, she asked the people he had mentioned if they had voluntarily disclosed salary information to Borgs and was told that they had not. On December 28, 1995, she and Berger met with Borgs. She told Borgs that she had learned that he had a list of salaries. Borgs denied having a list and said that what salary information he had was given to him voluntarily. She informed him of the Respondent's policy conceding confidential information, that he was being given a verbal warning and that any similar acts would be dealt with "in a harsher way." On the following day she prepared a warning notice and gave it to Berger to give to Borgs. After Berger told her that Borgs had taken the warning notice to show it to someone and had not resumed it, he was given a written notice that it had to be resumed by January 9, 1996. When Borgs did not return the warning notice on January 9, after being told to do so several times, she prepared another warning for insubordination.

Analysis and Conclusions

The Board has held that, in the absence of a business justification for it, a rule requiring that employee salaries be kept confidential and not be disclosed to other employees constitutes a clear restraint on the employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment. E.g., *Leather Center, Inc*., 312 NLRB 521, 527 (1992); *Heck's, Inc*., 293 NLRB 1111, 1119 (1989). The Respondent contends that Borgs was not interrogated about or disciplined for discussing salary information with other employees who voluntarily disclosed such information, but for the unauthorized acquisition and disclosure of salary information concerning supervisory employees who had not disclosed it to him.

The warning notice, dated December 28, 1995, prepared by Loehrke, states: "He [Borgs] was told that agency policy holds salary info. confidential and that unauthorized access to this info., and/or unauthorized release of this info., is unacceptable." A similar statement appears in the warning notice, dated January 9, 1996.[2] There is no evidence that this "unwritten policy" had actually been promulgated previously or that the Respondent had any business justification for such a policy. The finding of a violation for prohibiting disclosure of salary information "is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). The clear import of the Respondent's policy is that obtaining or disclosing any salary information is prohibited,

[2] These statements are consistent with Borgs' credible testimony as to what he was told by Loehrke about the confidentiality of salary information on December 28, 1995.

not just that which concerns supervisory personnel or is contained in confidential files, and that even voluntary disclosure of an employee's own salary would violate the policy. If the Respondent intended the prohibition to apply only to accessing salary information concerning supervisors or that which is physically contained in confidential files, it could have said so. Its blanket prohibition against obtaining or disclosing any salary information, in the absence of any business justification for such a rule, was overly broad and could reasonably be expected to stifle any discussion of salary information. See *Service Merchandise Co*., 299 NLRB 1125, 1126 (1990). I find that the Respondent's promulgation of this rule on December 28, 1995, violated Section 8(a)(1).

I also find that the interrogation of Borgs and the warnings issued to him for discussing salary information were unlawful. As noted, Section 7 protects employees' rights to discuss salary information. On December 28, 1995, Borgs was called in to a meeting with Berger, one of his supervisors, and Loehrke, the Respondent's highest ranking official, and quizzed about protected activity, viz., discussing salary information. Immediately prior to the meeting, Berger informed him that Loehrke was "really angry" over Borgs' having engaged in other, unrelated protected activity, his campaign to get the mileage reimbursement increased. At the meeting, he was questioned about whether he had discussed salary information with other employees, why he did so, and where he had gotten such information. Borgs admitted discussing salary information with other employees who had disclosed such information to him, but denied the accusation that he had a list of salaries. He was told that he had violated a policy against obtaining and disclosing salary information, that he was being given a warning for the violation, and that any similar activity would be dealt with in a harsher manner. In evaluating whether an interrogation concerning an employee's protected activity was coercive, all of the surrounding circumstances must be considered. *Rossmore House*, 269 NLRB 1176, 1177 (1985). I find that this interrogation of Borgs, which concerned an accusation that he had violated an unlawful policy against discussing salary information and was accompanied by a warning and threat of additional, harsher disciplinary action, had a reasonable tendency to restrain, coerce, and interfere with protected rights and violated Section 8(a)(1). *Super One Foods*, 294 NLRB 462, 464 (1989).

The clear language in the disciplinary warning notices issued to Borgs establishes that he was being disciplined for violating the Respondent's overly broad policy prohibiting obtaining and disclosing salary information. Since the policy was unlawful, disciplinary action based on a violation of that policy would, likewise, violate the Act. *Elston Electronics Corp*., 292 NLRB 510, 511 (1989). However, the Respondent contends that the real reason for the warnings to Borgs was that it had a reasonable belief that he had improperly obtained confidential salary information concerning supervisory employees who had not voluntarily shared such information with him. There no credible evidence to establish this. There is substantial evidence to the contrary, not the least of which is the failure to mention such a reason in either of the warning notices. Moreover, the evidence shows that, while Loehrke made the decision to take disciplinary action against Borgs, she had little, if any, personal knowledge concerning the alleged salary disclosures by Borgs and her actions were based entirely on information purportedly provided by Berger. Berger was not called as a witness by the Respondent and its failure to do so has not been explained. There is no evidence that Berger was unavailable at the time of the hearing or that he was not favorably disposed toward the Respondent. This creates the inference, which I draw, that Berger's testimony would not have supported the Respondent's position. See *International Business Machines*, 285 NLRB 1122, 1123 (1987). I also find that Loehrke's testimony about this matter cannot be credited. She stated that she first learned about the matter in November 1995 from Berger, who told her that Borgs had shown a list of salaries to Schoenberger and that in another incident Borgs and Hasan had told Berger that they had information about the salaries of supervisors. However, a memo, dated November 28, 1995, written by Berger, refers only to Schoenberger's report about Borgs' showing him a list of salaries and makes no mention of the alleged incident involving Borgs and Hasan. l find the fact that there is no mention of that incident in the memo, that no action was taken against Hasan (who credibly denied the incident ever happened) with respect to having obtained salary information, and that Berger did not testify establishes that the incident never happened. The record also contains a memo from Schoenberger to Berger in which he reported that Borgs showed him a list of salaries, complained about an unfair agency pay scale, and said that raises were not given to employees who deserved them but just to friends of Loehrke. The memo indicates that this had occurred on March 31, 1995, nearly 8 months before. That memo also contains a handwritten note by Loehrke, dated January 29, 1996, in which she states that, in talking with Schoenberger, she had "discovered" that the list was "verbal" and there was no written document. This suggests that she had not talked to Schoenberger about the matter before disciplining Borgs as she had implied during her testimony.

Finally, there is no credible evidence to support Loehrke's alleged belief that Borgs had improperly obtained confidential information concerning any supervisor's salary. Borgs has consistently maintained, when questioned by Loehrke and in credible testimony at the hearing, that whatever salary information he had was voluntarily disclosed to him by other employees. As discussed above, I do not credit Loehrke's testimony that Berger told her about Borgs and Hasan having information concerning the salaries of Berger, Wilson and Doubler. The only other evidence is Berger's memo to Loehrke about what Schoenberger had allegedly told him. That memo states: "I asked Jeff [Schoenberger] if I was on the list. I was, and the amount was not close." It follows that even if what Schoenberger said was true, since the amount was "not close" to being correct, there was no basis to conclude that Borgs had obtained such information from the Respondent's confidential files. I find that the Respondent issued the warnings to Borgs because he had violated its unlawful policy prohibiting the discussion of wages by employees and not because he had improperly obtained or disclosed confidential information concerning the salaries of supervisors. Since these warnings violated Section 8(a)(1), the additional basis for the second warning, Borgs' alleged insubordination and confiscation of agency property by not promptly resuming the first warning notice, was also unlawful.

C. Discharges of Borgs and Hasan

The complaint alleges that the Respondent unlawfully discharged Arnis Borgs and that it unlawfully reprimanded and discharged Ashrafal Hasan because they had engaged in concerted activities protected by the Act.

1. Alleged concerted activity

The evidence shows that during 1995 Borgs had been engaged in trying to get the Respondent to increase the amount it reimbursed employees for mileage when they used their personal vehicles for work. The Respondent's employee handbook provides that employees who are required to use their personal automobiles for business will be reimbursed at "the IRS approved rate for mileage." The IRS approved rate was 29 cents and employees were only receiving 25-cents per mile. He credibly testified without contradiction that, beginning in January and February, he had discussed the reimbursement issue with other employees in the employment department where he worked and later with employees in the social services department. Several indicated they approved of his raising the issue with the Employer. He described one such conversation, in which employee John Novak said that it would be great if Borgs got an increase for everyone, but that he did not want to be involved because he feared repercussions. In one of his communications to Loehrke about the issue, Borgs stated that at least five other employees had expressed their concern about it.

Borgs testified that he raised the reimbursement issue with the Respondent's bookkeeper and that on June 12, 1995, the bookkeeper issued a memorandum stating that from then on mileage would be reimbursed at the rate of 29-cents per mile. A short time later that same day, Berger read the memo and went around and told all employees that the memo had been rescinded. In July, Borgs went to Loehrke to ask about increasing the mileage reimbursement and followed up with a memo, dated September 30. He subsequently prepared and submitted a bill, dated November 15, 1995, for $135.60, representing the difference between the amount he was paid for mileage during 1995 and what he claimed was due him under the 29-cent-per-mile rate. Loehrke responded with a note, dated November 20, stating that the 25-cent-per-mile rate would be in effect until further notice. Borgs sent her another memo, dated November 22, pointing out that the handbook called for reimbursement at the IRS approved rate and asking for an explanation as to why the policy in the handbook was not being followed. He sent another memo, dated December 11, 1995, to Loehrke asking for clarification of the reimbursement policy. Loehrke resumed the memo with a handwritten note on it saying that she had already discussed the matter with him "2 times." On December 19, 1995, Loehrke issued a memo stating that mileage reimbursement would be made at 29 cents per mile, retroactive to January 1, 1995.

Between August and December 1995 Borgs and Hasan engaged in a "Brown Bag Lunch" program in which employees got together about a half dozen times during their lunch hours to discuss matters of mutual concern. Borgs testified that around the time the program began both Loehrke and Berger indicated that they disapproved of the meetings and that Berger told one of the secretaries that she could not attend. Hasan testified that Berger was critical of the program and questioned why the meetings were being held which prompted him to invite Berger to attend. In November 1995 Borgs and Hasan started an "Ethics Committee" which held two meetings in which employees were given the opportunity to address problems concerning employee relations and delivery of services to clients. Hasan testified that Berger told him that Loehrke questioned the purpose of the committee and felt that its title implied that "there is something unethical going on." Minutes of the meetings were posted in the office. They also distributed a questionnaire to the employees asking for their opinions about work related matters, including, "leadership vision" and "supervisory integrity."

There is evidence that one of the clients involved in the NIDRR project had multiple disabilities requiring the use of an interpreter and that Hasan and Borgs had hired an interpreter without following the agency's subcontracting procedure. Hasan testified that Berger refused to pay the invoices he submitted for the interpreter's services and he had to pay her himself to prevent the disruption of services to the client. Carol Doubler testified that, at the direction of Berger, she contacted the interpreter and requested that she appear for an interview and to complete the required paperwork. The interpreter told her that she was upset about statements that Hasan and Borgs had made that indicated she was being used in a "political battle" they were fighting at the agency and that she did not wish to have any further contact with either of them. Doubler told Hasan what the interpreter had said, but a week later the interpreter called to say that Hasan had contacted her again and that she was extremely upset over it. The record contains a memo Berger wrote, dated June 7, 1995, about the incident which states that Hasan and Borgs were given verbal warnings for their actions. The memo was apparently placed in their personnel files. Hasan and Borgs both testified that they had discussed the interpreter incident with Berger and that after they clarified what had happened, Berger told them that he had misunderstood the facts concerning the incident and that nothing derogatory or negative would be put in their personnel files. Hasan subsequently reviewed his personnel file and discovered the warning memo Berger had placed there. Thereafter, he wrote a memo to Berger, dated, October 5, 1995, in which he referred to their previous conversation, complained about Berger's placing the warnings in their files and demanded an explanation. Hasan sent copies of this memo to both Loehrke and Borgs. Berger responded with a memo dated October 13, 1995, which criticized the "insubordinate tone" of Hasan's memo and accused him of undermining Berger's supervision of Borgs by sending a copy of it to him. Loehrke testified that she considered Hasan's memo threatening, hostile and disrespectful, that she felt Hasan "had crossed the line," that "strong action had to be taken," and that she assisted Berger in preparing his response. She said that she considered Hasan's memo insubordinate and that by sending a copy to Borgs, who had no need to be involved, it might also encourage him to be insubordinate. Loehrke had no personal knowledge of the interpreter incident and did not talk to Hasan about his memo. Berger did not testify.

Consequently, I find no reason to doubt the uncontradicted testimony of Hasan and Borgs that Berger told them there would be nothing adverse placed in their files as a result of the incident. When Hasan discovered that Berger had, in fact, issued warnings to both him and Borgs, based on that incident, his efforts to question and dispute the warnings constituted concerted activity on his part. There is nothing in the memo that is so outrageous, egregious or disruptive as to lose the protection of the Act. E.g., *Martin Marietta Corp*., 293 NLRB 719, 725 (1989); *YMCA of Pikes Peak Region*, 291 NLRB 998 (1988).

2. Events leading to the discharges

On January 17, 1996,[3] Hasan and Borgs prepared and submitted a memo to Berger concerning the NIDRR project which stated:

[3] Hereinafter, all dates are in 1996.

> Mr. Jim Troxell and Dr. Bob Fraser have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR School-to Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed deals with outreach. *Only* support staff assistance is needed in this regard.

A copy of the memo was sent to Loehrke who was away from the office at the time.

Hasan and Borgs testified that they had encountered problems with Berger failing to carry out tasks relating to out reach for the project. The memo was intended as a needs assessment for the project, which Hasan described as "top heavy" with supervision while what was really needed was more secretarial help. When they reamed that both Berger and Loehrke were very unhappy about the memo, they submitted another eight-page memo, dated January 29, with the stated intention of elaborating on the reasons underlying the previous memo, detailing the problems they felt were undermining and endangering the project, and suggesting solutions.

On February 1 Berger came to Hasan and Borgs and told them that Loehrke wanted each of them to meet individually with her and Berger. Hasan informed Berger that they were involved in a meeting and could not meet with them at that moment. A short time later, Loehrke came in and informed them that they had to meet. Loehrke told Borgs that she needed him to meet with her and Berger. Borgs testified that he declined because he felt intimidated after the meeting he had alone with the two of them about salary information. Borgs said that he would meet with Loehrke alone, but she said that was not an option and that Berger had to be present. Borgs asked if Hasan could also be present and Loehrke said that also was not an option. When Borgs reiterated his refusal to meet with the two of them by himself, Loehrke told him to go home for the rest of the day and report back at 9 a.m. on the following morning. Borgs was told to surrender his key to the office and was escorted out of the building. When he resumed the next day, he met with Loehrke and Wilson in a conference room. Loehrke told him that his refusal to meet the previous day constituted gross insubordination and that he was terminated. He was given a termination letter, signed by Loehrke, stating that over the last several weeks the agency had brought to his attention, "several concerns about [his] conduct and performance." This included failing to build constructive work relationships with management personnel and resistance to accepting performance goals. The letter also refers to his involvement in the January 17 memo, which is said to indicate his unwillingness to accept supervision of his work, and his refusal to meet with Loehrke and Berger on February 1 to discuss these issues, which is said to be an unacceptable challenge to her authority and to constitute gross insubordination.

Hasan eventually agreed to meet with Loehrke and Berger on February 1. Hasan testified that during the meeting, which lasted about 20 minutes, Loehrke expressed her annoyance with the January 29 memo and said she would not tolerate such memos. Hasan told them that both memos were needs assessments meant to identify difficulties in the project and how to implement ways to revitalize it. After the meeting ended, Hasan received a warning notice in his mailbox, stating that the memo of January 17, he had co-signed, constituted gross insubordination and any further acts of misconduct or insubordination would result in immediate discharge.

Loehrke testified that Hasan also initially refused to meet with her and Berger and that he agreed only after he refused her order to leave the building and she had threatened to have him removed by the police. She said that the memo of January 17 indicated that Hasan and Borgs felt they did not need supervision by Berger and that the purpose of the meeting was to tell Hasan that she considered the content of the memo "inappropriate," as was the method in which it was delivered to Berger, while she was away from the office. At the meeting, Hasan told her that the memo was a needs assessment. She told him that needs assessments were neccessary but that she had never seen a needs assessment done in such a manner, that she did not see the memo as a needs assessment but as a dismissal of Berger from his supervisory duties over the project which constituted insubordination, and that she expected him to work with Berger as his supervisor to complete the project. She attempted to give him a written warning notice for insubordination, but he refused to take it or to sign it. She read the notice to him and put a copy in his mailbox. Loehrke testified that she did not discuss the January 29 memo with Hasan at the February 1 meeting because she considered it a separate issue from the January 19 memo, which she felt warranted strong disciplinary action. However, she and the director of administration met with Hasan on February 2 for about 2 hours in order to go over each of the concerns and accusations expressed in the January 29 memo.

On March 25 Hasan was called to Loehrke's office where he was told that he was being terminated. Hasan testified that he was given no reason for his termination at that time. On March 29 when he returned to pick up his belongings, he was given a letter signed by Loehrke stating that he was terminated for his conduct over the previous 9 months, including, refusal to accept supervision on the NIDRR project and various confrontations with staff members. Loehrke testified that Hasan was terminated because he refused to sign a statement of personal project objectives given him by Berger, that his refusal was done "willingly" and "defiantly," that it constituted gross insubordination and subjected him to discharge. The Respondent's brief confirms that the reason Hasan was terminated was his refusal to sign the performance objectives.

Analysis and Conclusions

The General Counsel contends that Hasan and Borgs were discharged in retaliation for their having engaged in concerted activity protected by the Act. The Respondent contends that their actions in connection with the January 17 memo to Berger did not constitute protected activity and the other instances of concerted activity on their part had nothing to do with their terminations.

In cases where an employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must persuade the Board that animus toward protected activity on the part of the employee was a substantial or motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the

same action even in the absence of protected activity on the employee's part. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996). The General Counsel's initial burden is met by proof of protected activity on the part of the employee, employer knowledge of that activity and employer animus toward it. *W. R. Case & Sons Cutlery Co*., 307 NLRB 1457, 1463 (1992).

a. Arnis Borgs

In the case of Borgs, l find that his efforts throughout 1995 to obtain increased mileage reimbursement for agency employees constituted protected concerted activity in that they were "engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself." See *Meyers Industries*, 281 NLRB 882, 885 (1986). His uncontradicted testimony that he told Loehrke that he had discussed the matter with at least five other employees establishes that the Respondent had at least constructive knowledge of the concerted nature of those activities. See *Nicola's*, 299 NLRB 860, 863 (1990). Borgs' uncontradicted testimony that Berger told him that Loehrke was "really angry" about his raising the reimbursement question establishes the Respondent's animus toward his activity. I have also found that Borgs was unlawfully disciplined for engaging in the protected activity of discussing employee salaries with another employee. Neither of these matters was so remote in time from his discharge as to preclude inferring a causal connection between those activities and the discharge. Consequently, I find that there is evidence sufficient to support the inference that Borgs was discharged in retaliation for his having engaged in those activities. I also find that the Respondent has established that it would have discharged Borgs even in the absence of those protected activities on his part.

As is discussed below, I find that the memo that Borgs and Hasan sent to Berger on January 17 did not constitute activity protected by the Act; therefore, disciplinary action arising as a direct or indirect result thereof did not violate the Act. An employer has the right to maintain order and to control its workplace and to discipline its employees for misconduct. *Postal Service*, 268 NLRB 274, 275 (1983). Loehrke credibly testified that she wanted Borgs to meet with her in Berger's presence in order to make it clear to him that he had to work under Berger's supervision on the NIDRR project and to give him a written warning for his involvement in the January 17 memo. When Borgs refused to meet with her, she considered his action to be gross insubordination which threatened to undermine her authority as executive director of the agency. I find that Borgs' persistent refusal to comply with Loehrke's direct order to meet constituted insubordination and that the Respondent did not violate the Act by discharging him for this misconduct. Cf. *Carolina Freight Carriers Corp*., 295 NLRB 1080 at fn. 1 (1989).

The General Counsel also contends that Borgs' discharge was unlawful because he was denied the right to be represented by a fellow employee, Hasan, at an investigatory interview he had reason to believe could result in disciplinary action against him. See *NLRB v. Weingarten, Inc*., 420 U.S. 251 (1975). I find the evidence establishes that the meeting that Borgs refused to attend with Loehrke and Berger was intended to be an investigatory interview; that he had reason to believe the interview could result in disciplinary action; that he made a timely request that Hasan be allowed to accompany him to the interview, which was denied; and that he was discharged because of his refusal to attend the interview. However, current Board law is clear that *Weingarten* rights to representation in investigatory interviews are limited to "employees in unionized workplaces who request the presence of a union representative." *E. I. DuPont & Co.*, 289 NLRB 627, 631 (1988). The General Counsel recognizes this but seeks to have the Board reconsider the matter. That request must be taken up with the Board. It is the duty of an administrative law judge to apply established Board precedent which the Board or the Supreme Court has not reversed. E.g., *Herbert Insulation Corp*., 312 NLRB 602, 608 (1993); and *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616 (1965). I find that the Respondent did not violate Section 8(a)(1) by discharging Borgs for refusing to attend an investigatory interview on February 1, after his request that Hasan be allowed to accompany him at that interview was denied.

b. Ashraful Hasan

In the case of Hasan, I find the evidence fails to support an inference that the Respondent harbored animus toward Hasan based on protected activity on his part to the extent that it would violate the law in order to put a stop to such activity. See *Rayself-IDE, Inc*., 284 NLRB 879, 880 (1987). I find no evidence to support the General Counsel's contention that Loehrke had "a hostile, almost paranoid attitude, toward employees who engage in concerted activities, or which she perceives as concerted." Although there was uncontradicted testimony that Berger was critical, at least initially, of the "Brown Bag Lunch" program Hasan and Borgs started, Loehrke credibly testified that she supported the idea of holding the lunches and there is no evidence that she interfered with the program or took any adverse action against any participant. Her testimony that she was a little concerned about the title of the "Ethics Committee" they proposed because it implied there was something unethical going on, without more, does not establish animus, particularly, where there is no evidence that she did anything to discourage or prevent the formation of such a committee or took any adverse action against the participants. Moreover, Hasan's involvement in these activities and the flap over the comments placed in his personnel file in connection with the interpreter matter were remote in time and unrelated to the events that led to his discharge. See *D & W Food Centers*, 305 NLRB 553 (1991).

The main thrust of the General Counsel's case with respect to Hasan is that the Respondent retaliated against him because of his involvement in the January 17 memo to Berger, which is asserted to have constituted protected activity on his and Borgs' parts. Although both Hasan and Borgs have attempted to portray their January 17 memo to Berger as a "needs assessment," this characterization and their memo of January 29 appear to be after-the-fact attempts at damage control. There is nothing in the January 17 memo which details any problems with the NIDRR project or attributes them to supervisory shortcomings on the part of Berger. It does not propose any solutions or request that Loehrke or the Respondent take appropriate remedial action and it does not seek to enlist the support of other employees for their mutual aid or protection. Unlike the leaflets distributed to fellow employees in *Dreis & Krump Manufacturing, Inc.*,[4] this memo does not purport to protest the quality of Berger's supervision as it relates their or other employees' working conditions and unlike the complaints by employees in *Fair Mercantile Co*.,[5] the memo is not an attempt to discuss problems related to Berger's supervision of them with higher management. It simply informs Berger

[4] 221 NLRB 309 (1975).

[5] 271 NLRB 1159 (1984).

that his supervision of Hasan and Borgs "is not required." The clear import of the memo is that they were dismissing him as their supervisor and from involvement in the NIDRR project. If what they wanted to do was to raise concerns about the project or the quality of Berger's supervision, they could have said so. This was not a situation like that in *NLRB v. Washington Aluminum Co*.,[6] in which employees who were not particularly sophisticated or articulate "had to speak for themselves as best they could." 370 U.S. at 14. Borgs was a college graduate and Hasan has a doctorate. It must be assumed that they knew what they were doing and crafted the memo to accomplish their goal. It must also be assumed that, once the memo was issued, neither Hasan nor Borgs considered himself subject to Berger's supervision. Since Loehrke was not directly involved in the project after September 1994, and in any event was out of town when the memo was issued, it in effect purported to remove the Respondent from any supervisory role over the NIDRR project. Not surprisingly, Loehrke interpreted the memo as a dismissal of Berger from the project and she considered it grossly insubordinate. The evidence also shows that when Loehrke received the memo of January 29, in which Borgs and Hasan actually detailed what they considered to be problems with the project and proposed some solutions, she promptly met with Hasan to discuss those matters and took no adverse action against him. l find that the actions of Borgs and Hasan in writing and issuing the January 17 memo were concerted but were not protected under the Act. Accordingly, the Respondent did not violate the Act by issuing a disciplinary warning to Hasan for insubordination for his part in the purported dismissal of Berger from the NIDRR project. I also find that the Respondent's actions in response to the memo were not motivated by animus toward Hasan for engaging in protected activity, but were prompted by his insubordinate conduct.

There is evidence that Hasan had been involved in a number of incidents having nothing to do with protected activity, which Loehrke considered insubordinate and/or disruptive; including, the substance of the matter involving the interpreter (as opposed to Hasan's complaint over the memo placed in his personnel file), confrontations over his demands for preferential treatment in obtaining clerical assistance and an incident in which his insensitive behavior adversely impacted the parents of an agency client. It may well be that she was looking for a reason to terminate him and that she seized on his refusal to sign the statement of project objectives to do so. In the absence of evidence sufficient to support an inference that animus toward protected activity on his part was a motivating factor in his discharge, her reason is irrelevant. It is well recognized that an employer is free to run its business as it pleases and can discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason. See *Wright Line*, supra at 1084. Having found there was no nexus between Hasan's discharge and protected activity on his part, I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Epilepsy Foundation of Northeast Ohio, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating, issuing disciplinary warnings to and threatening Arnis Borgs with unspecified reprisals for discussing wage information, and by promulgating a rule prohibiting employees from discussing such information with other employees.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found here.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

[6] 370 U.S. 9 (1962).